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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. 276

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD

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State Farm Mutual Automobile Insurance Company petitions for a writ of certiorari to review a judgment of the Court of Appeals for the Seventh Circuit entered April 30, 1969 which enforced an order of the respondent National Labor Relations Board.

Opinions of the Board and Court Below

A panel of the court below first decided this case on August 8, 1968 against the Board, denying its petition for enforcement. The majority and minority opinions of the panel, not yet reported, appear at pages 1a and 15a of the appendix. On rehearing *in banc*, the court on March 26, 1969 reached the opposite conclusion by a vote of six

to two. The opinions of the court *in banc,* also not yet reported, appear at pages 20a and 29a of the appendix.

The decision and direction of elections of the National Labor Relations Board in the underlying representation proceeding are reported at 158 N.L.R.B. 925 and appear at page 39a of the appendix. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding are reported at 163 N.L.R.B. No. 94 and appear at page 51a of the appendix.

The decision and direction of election of the Board's Regional Director in a companion case, not reported, appear at page 63a of the appendix; the decision and order of the Board in that case are reported at 169 N.L.R.B. No. 122 and appear at page 70a of the appendix.

Jurisdiction

The judgment of the Court of Appeals was entered April 30, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

The questions presented are:

1. The proper standard to be applied by Courts of Appeals in the review of a determination by the National Labor Relations Board as to the appropriateness of a collective bargaining unit; and whether and to what extent the Board, in making such a determination, is required to give weight to the manner in which and the supervisory level at which the subjects of collective bargaining have been and will be administered by the employer.

2. Whether unit determinations of the National Labor Relations Board which will result in representation by different and competing labor unions of employees of a single employer, who work side by side and do the same

work, are in conflict with the policy of §9(b) of the National Labor Relations Act and with applicable decisions of this Court.

Statute Involved

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 36, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), appear at page 81a of the appendix.

Statement

A. Board Proceedings

1. First Representation Case

On September 27, 1965, Insurance Workers International union, AFL-CIO ("the Union") requested certification as the bargaining representative of petitioner's claim representatives* working out of local offices in the five boroughs of New York City and the neighboring counties of Westchester, Nassau and Suffolk. These offices were some of those under the direction and control of petitioner's New York auto division manager, who supervised all claim representatives in the State of New York (App. 41a-42a).**

The Union's claim was that each local office constituted an appropriate bargaining unit and that several could be grouped for collective bargaining in a single unit encompassing the metropolitan area. Petitioner argued that the requested unit was inappropriate in view of the highly

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* The duties of a claim representative are those of an "adjuster", one who investigates and attempts to settle automobile casualty claims.

** "App." refers to the appendix to this Petition. "J.A." refers to the Joint Appendix below.

centralized nature of its operations and the fact that its labor relations policy was formulated and administered at higher levels (App. 40a, 47a-48a).

The Board found that petitioner conducts a highly centralized business with all operating policies determined at its home office in Bloomington, Illinois. All personnel policies are similarly determined at the home office and are uniformly applied to all employees. For administrative purposes, petitioner is divided into twenty-one regions of the United States and Canada. The Northeastern Region, with jurisdiction over New York, New Jersey, and the New England States, is headquartered in Wayne, New Jersey, under the direction of a regional vice president (App. 41a).

Under the regional vice president who, the Board found, has final decision-making authority as to personnel matters within the region, were two auto operating divisions, one life operating division and one sales division (App. 41a, 44a). The auto division manager for the State of New York supervised the work of the claim representatives involved in this case. He was the lowest ranking official with power to make effective recommendations on personnel matters affecting claim representatives (J.A. 51-53, 62-63).

Below the auto division manager were divisional superintendents, whose number fluctuates with the volume of business in the division (J.A. 44-45). Under the direction of the auto division manager, divisional superintendents supervise instruction of claims personnel, review files, train claim superintendents, and may settle claims for amounts greater than may the claim superintendents or claim representatives (App. 43a). The divisional superintendents in this case are based at the regional office in New Jersey and visit the offices under their supervision about once every two weeks (App. 43a).

The lowest level supervisor is the claim superintendent who trains claims representatives in the handling of claim matters, reviews files and may settle claims in amounts greater than may the claim representatives (J.A. 54-56). Most claim superintendents are based at the regional office, but some are located at the local offices with the claim representatives (J.A. 82, 182).

In personnel matters, the degree of involvement of the divisional superintendents and claim superintendents was equal; neither had any authority to make effective recommendations concerning such matters (J.A. 51-53, 62-63).

On these facts the Board concluded that the unit requested by the Union was inappropriate, but that any one of three units would be appropriate. Thus a unit consisting of the claim representatives supervised by the regional vice president would be appropriate, and so would such a unit supervised by an auto division manager, or by a divisional superintendent (App. 46a-47a). Among these three units, the Board chose the smallest, i.e., the one supervised by the divisional superintendent.

The Board had earlier developed a special rule for determining bargaining units in life insurance agent cases (e.g. *Quaker City Life Insurance Co.*, 134 N.L.R.B. 960 [1961]). In reaching its conclusion in the instant case, the Board felt itself impelled to follow those life insurance agent cases, notwithstanding its express holding that (App. 45a-46a).

> "The evidence of record in the case before us presents a significantly different picture of field operating procedure from that developed in [*Quaker City Life Insurance Co.*, 134 N.L.R.B. 960 (1961) and *Metropolitan Life Insurance Co.* (*Woonsocket, R.I.*) 156 N.L.R.B. 1408 (1966)]."

Apart from the fact that petitioner concededly does an insurance business, there was no basis in the record for applying to these bargaining units any standard other than the one applicable to employers generally.

The Board's unit determination resulted in a direction that two elections be held, one each among the claim representatives working out of local offices then under the supervision of two of the Company's divisional superintendents (App. 49a). The Union won the election in one of the units, and lost it in the other.

2. The First Unfair Labor Practice Case

Petitioner refused to bargain with the Union in order to obtain judicial review of the Board's unit determination. After issuance of a complaint and answer by the Company, the General Counsel of the Board moved for summary judgment. Petitioner opposed the motion, but it was granted and petitioner was directed to bargain with the Union. It is this order that was first denied enforcement by a panel of the Seventh Circuit, and then enforced by the court *in banc*.

3. The Second Representation Case

As indicated, of the two units established by the Board in the first representation case, the Union won the election in only one. On May 12, 1967, a second union, American Communications Association ("ACA"), affiliated with the Teamsters, requested the Board to certify it as the bargaining representative of the unit in which the Union had lost the election. Petitioner again opposed the certification of the unit sought, pointing out the expected changes in petitioner's organizational structure brought about by the growth of its business and the result, if the Board's first unit determinations were adhered to, that employees doing the same work in the same local office

would fall into different bargaining units and could be represented by competing unions.

The Regional Director, considering himself bound by the Board's first unit determination, certified the unit sought by ACA (App. 63a). The Board declined to review the Regional Director's decision, and ACA won the ensuing election and was certified.

4. The Second Unfair Labor Practice Case

The instant case was already pending in the court below when petitioner was requested to bargain with ACA. Consistently with its position in this case, petitioner refused to bargain, and a Board complaint issued.

When the General Counsel moved for summary judgment, petitioner opposed, specifically pointing out that what had earlier been feared had now eventuated: there were now two units represented by competing unions, and, in some instances, employees doing the same work and working side by side in the same office were, under the Board's decisions, in fact going to be represented by different unions.

Petitioner sought review of the Board's second order in *State Farm Mutual Automobile Insurance Company* v. *National Labor Relations Board*, No. 16809, Seventh Circuit. That case was argued on May 19, 1969 and has not yet been decided.

5. The Nature of the Units Certified by the Board

In the life insurance cases treated by the Board as a model for its determinations in this case, the unit was always determined by reference to a local district office, supervised by a district office manager. Definition of the unit by geographical reference to the location of the office served also to identify the manager who supervised the

agents in that office. In the case at bar, the claim representatives serve a function entirely different from that of life insurance agents, and the company's organization bears no resemblance to that of the life insurance companies.

The reasons articulated by the Board for its determination in this case fixed upon the divisional superintendents as "a supervisory focal point" who "appear to exercise powers most closely analogous to those possessed by the district office managers in the earlier cases" (App. 46a). But the actual unit determination (App. 48a) made no reference to the divisional superintendent, and defined the unit in geographical terms: "claim representatives . . . assigned to" specified local offices in New York.

The divisional superintendents, however, worked out of the regional office in New Jersey, not in the local offices, and were not permanently assigned to the supervision of entire local district offices. It was therefore apparent that, as petitioner's business grew and more divisional superintendents were added, some claim representatives in a single local office might come under the supervision of one divisional superintendent while others in the same office would fall under the jurisdiction of another (J.A. 199-201).

What appeared to be inevitable when this case came before the Board, became a fact by the time the companion case was decided. Now, if the Board's determinations are permitted to stand, the claim representatives working side by side in a single local office and doing the same work will be represented by different and competing unions.

B. Panel and *In Banc* Opinions

In the lower court's first decision of this case, a majority of a panel found no evidence that the unit supervised by

a divisional superintendent is autonomous. Relying on the Seventh Circuit's own decision in *NLRB* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F. 2d 895 (1966), and on *NLRB* v. *Purity Food Stores, Inc.*, 376 F. 2d 497 (1st Cir. 1967),* the majority concluded also that the divisional superintendents "possessed no significant managerial authority" (App. 14a).

> "It is for the reviewing court to decide whether the Board's determination is supported by substantial evidence, whether its discretion was reasonably exercised and whether it disclosed a proper basis for its order. *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438, 443.
>
> "We have read and reread the Board's decision in the representation proceeding, its findings and conclusions, together with its brief filed in this court, and reach the definite conclusion that its determination of the unit in controversy is not supported by substantial evidence and is clearly erroneous." (App. 5a)

On rehearing *in banc*, the majority found "of particular significance" the "fact that the next largest unit available under the Company's organizational structure covers a multi-state area" (App. 24a). This, said the majority, would frustrate the Board's preference for "less than state-wide unit[s]" in insurance agent cases** (App. 25a).

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* In which certiorari had been denied, 389 U. S. 959 (1967).

** In fact, petitioner argued below for a unit supervised by an auto division manager who, at the time the record was made, had, but no longer has, state-wide authority. The argument was based on his managerial functions and not on geography. Even while this case was being heard by the Board, petitioner had auto division managers in other parts of the nation whose geographical jurisdiction extended only to a part of a state and, in several instances, only to a metropolitan area.

Finally, the authority of a district office manager, according to the majority, "does not significantly differ from the authority of the divisional claims superintendent in the case before us . . ." (App. 25a). In this respect, the *in banc* majority came to a conclusion exactly contrary to the finding of the Board that this case "presents a significantly different picture" (*supra*, p. 5), and relied heavily on that conclusion to affirm the Board's unit determination.

Reasons for Granting the Writ

This case presents a fundamental question concerning the standards to be applied by Courts of Appeals under the National Labor Relations Act when they are called upon to review unit determinations. While unit determinations are a major part of the Board's business,* this case and five other recent decisions of Courts of Appeals (which we discuss, *infra*) have served to leave in confusion the standards by which they are to be reviewed.

The conflict between panel and *banc* in the case at bar is itself evidence of this confusion. While both cited and purported to follow *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438 (1965) (App. 5a, 23a), both reached opposite conclusions on the same record.

Certiorari should be granted because the Act cannot be evenhandedly administered without a clarification by this Court of this important question.

Certiorari should be granted also because the decision below has resulted in bargaining units having no relevance to the collective bargaining process, and are therefore inconsistent with the language and purpose of Sec-

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* National Labor Relations Board Thirty-Second Annual Report, pp. 215, 228-29, 231 (1968).

tion 9(b) of the Act and with an applicable decision of this Court.

1. Section 9(b) of the Act empowers the Board to decide "in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Although the Board is granted wide discretion in determining the appropriate bargaining unit, §10(e) of the Act requires the Courts of Appeals to accept the Board's findings of fact only "if supported by substantial evidence on the record considered as a whole . . ."

In *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951), this Court, after noting the difficulties inherent in the substantial evidence test, held that to satisfy the Congressional mandate that Board decisions be reasonable and fair, the Courts of Appeals must not subjugate their judicial function to the administrative function performed by the Board.

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function . . . . The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." *Id.* at 490

Although the issue of substantiality of evidence is primarily for the Courts of Appeals, this Court has assumed the obligation to intervene in "the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Id.* at 491; *NLRB* v. *Walton Mfg. Co.*, 369 U. S. 404, 408 (1962).

Such a "rare instance" has now occurred for, while the court below acknowledged that an "arbitrary or unreasonable" determination of the Board must be overturned (App. 23a), it grossly misapplied that standard when it ignored the fact that the Board had failed to give any weight to petitioner's administrative structure and to the supervisory level in petitioner's organization at which labor relations decisions are made.

As the panel decision of the court below correctly pointed out, this failure on the Board's part deprived its determination of any substantial support in the evidence and therefore of any "proper basis for its order" (App. 5a). Other recent decisions of Courts of Appeals serve to illustrate the confusion engendered by the decision *in banc* below.

In *NLRB* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F. 2d 895 (7th Cir. 1966), decided by the same Circuit as was the case at bar, the Board found appropriate a unit consisting of the employees in a single restaurant which was one of the chain of ten located in Indianapolis. The decision was based on a finding of "autonomy" in each restaurant. The court denied enforcement because the undisputed facts showed that a common labor policy affecting all employees was formulated for the entire chain by the chief executive of the company. Neither the store manager nor the area supervisor, each of whom had jurisdiction over several stores, was vested with "any significant element of judgment as to employment relations"

or would "be deciding questions affecting the employees in the context of collective bargaining" (*Id.* at 897).

In *NLRB* v. *Purity Food Stores, Inc.*, 376 F. 2d 497 (1st Cir.), *cert. denied*, 389 U. S. 959 (1967), the Board found appropriate a unit consisting of the employees of a single supermarket—one of a chain of seven located within a radius of thirty miles from Chelmsford, Massachusetts. The Board decision had been based on the "significant autonomy" of the single store, notwithstanding highly centralized administration and frequent employee transfers from store to store. The court denied enforcement because "only friction between employees and chaos in labor relations could possibly result if some employees were under union rules as to wages, hours, seniority, grievance procedures, etc. when the employees working beside them in the same category were not. The Board's conclusion to the contrary flies in the face of reality" (*Id.* at 501).

While conceding the Board's broad discretion in unit determination cases, the court in *Purity* found that the Board had failed to offer for its unit determination the substantial reasons required by this Court in *Metropolitan Life.*

In *NLRB* v. *Davis Cafeteria, Inc.*, 396 F. 2d 18 (5th Cir. 1968), the court followed *Frisch's* and *Purity* to set aside a unit consisting of two cafeterias, when under the Company's form of organization, eight such cafeterias constituted a single administrative district. The Board had found that a central office determined labor policy, but that each cafeteria manager had sufficient autonomy to render each cafeteria an appropriate unit. The court refused to enforce because the entire record revealed that the factors on which the Board had relied did "not constitute any sort of local managerial authority over substantive subjects of collective bargaining" (*Id.* at 20). There-

fore, said the court, the Board had abused its discretion and its decision was not supported by substantial evidence.

In *NLRB* v. *Solis Theatre Corp.*, 403 F. 2d 381 (2d Cir. 1968), it was held "of marked significance that [the owner of a 'circuit' of fifteen motion picture theatres] sets a single labor policy for the entire circuit, which has resulted in similar wages, hours and working conditions for all of its employees" (*Id.* at 383). While the Board had based its single-theatre unit determination on the role of the manager of the theatre, the record revealed that he had "little or no authority on labor policy but is subject to detailed instructions from the central office" (*Id.* at 383). Consideration of the record as a whole therefore brought the court to the conclusion "that the facts on which the decision of the Board is based are not supported by substantial evidence. The Board's action must under the circumstances be held to be arbitrary and unreasonable . . ." (*Id.* at 382).

An opposite result was reached by the same Circuit in *Continental Insurance Co.* v. *NLRB*, — F. 2d —, 70 LRRM 3046 (2d Cir. 1969), which involved a casualty insurance company with branch claims offices each under the supervision of a branch claims manager. The Board held each branch claims office appropriate as a bargaining unit. In that case, as in the case at bar and as in all the Court of Appeals decisions discussed above, final decisions concerning labor relations matters were made at higher levels of the company. The court concluded that the Board did have the power to "fractionate a multi-unit operation whose labor policy is centrally directed and administered" (Slip Op. p. 1907).

The opinion *in banc* in the instant case took no cognizance of *Davis* or *Solis* and mentioned *Frisch's* and *Purity* only to say that neither "is controlling or persuasive on

the facts here" (App. 26a). The Second Circuit, in *Continental Insurance*, tackled the problem more forthrightly but its tortuous effort to distinguish the four cases provides an eloquent statement of the reason why certiorari should be granted here.

The question presented by these cases for resolution by this Court is whether the Board acts arbitrarily and unreasonably when, in articulating the reasons for its unit determinations, it fails to give due weight to the administrative organization of the employer and to the manner in which, under that organization, questions affecting labor relations and collective bargaining are to be decided. The Board, by its decisions, has indicated an unwillingness to abide by any adverse decision in this field; for example, in the court below, the Board's brief suggested that the decision in *Frisch's* was an "aberrational abuse of judicial power" (App. 36a).

It is fair to expect therefore, that, until the question is settled by this Court, the Board will treat decisions of the Courts of Appeals on this question as interlocutory and not binding on it. Employers and unions, at the same time, find it impossible to determine with any degree of certainty whether employers are required by law to bargain with representatives of units established under these conditions, and employers are encouraged by the confusion to seek judicial review in every doubtful case.

Only the granting of certiorari in a case such as this can serve to dispel this confusion.

2. Section 9(b) of the Act charges the Board with the responsibility for establishing units "for the purposes of collective bargaining" and within which the process of collective bargaining must function. It was early decided in *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 165 (1941) that "[a]s a standard" for determining a collective

bargaining unit, the Board must comply "with the requirement that the unit selected must be one to effectuate the policy of the act, the policy of efficient collective bargaining."

That policy has been frustrated by the decision below, not only because of the lack of managerial authority over the subjects of collective bargaining at the level chosen by the Board as a "supervisory focal point," but also because the two units found appropriate will include employees doing the same work side by side and represented by different and competing unions.

Courts of Appeals have also required the Board to adhere to the standard of "efficient collective bargaining," and have refused enforcement of bargaining orders whenever the record has indicated a failure to establish units which recognize the realities and pressures of the collective bargaining process. E.g., *NLRB* v. *Harry T. Campbell Son's Corp.*, —— F. 2d ——, 59 L.C. §13,306 (4th Cir. 1969); *Rayonier, Inc.* v. *NLRB*, 380 F. 2d 187, 194-195 (5th Cir. 1967); *NLRB* v. *Purity Food Stores, Inc.*, 354 F. 2d 926, 931 (1st Cir. 1965); *NLRB* v. *Convair Pomona*, 286 F. 2d 691, 696 (9th Cir. 1961).

In this case those realities included the facts: (1) that each divisional superintendent sits in New Jersey and supervises, but has no significant authority over the wages, hours or other working conditions of a group of employees located in New York; and (2) that normal and predictable growth in petitioner's business led inevitably to an increase in the number of divisional superintendents and to reshuffling of the employees among the groups supervised.

Certiorari should therefore be granted for the additional reason that the judgment below decides a federal question in a way in conflict with the policy of the Act and with an applicable decision of this Court.

CONCLUSION

For the reasons given, the writ of certiorari should be granted.

Respectfully submitted,

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DONALD P. MCHUGH

June 20, 1969

APPENDIX

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1967, APRIL SESSION, 1968

No. 16175

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *Petitioner,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	On Petition to Review and Set Aside an Order of the National Labor Relations Board.

AUGUST 8, 1968

Before MAJOR, *Senior Circuit Judge,* and SCHNACKENBERG and KILEY, *Circuit Judges.*

MAJOR, *Senior Circuit Judge.* This case is here on petition of State Farm Mutual Automobile Insurance Company (Company) to review and set aside an order of the National Labor Relations Board (Board), issued March

29, 1967, pursuant to Section 10 (c) of the National Labor Relations Act as amended (29 U.S.C.A. Sec. 151 et seq.). The Board by answer requests enforcement of its order, which is reported at 163 N.L.R.B. No. 94. The Company is an Illinois corporation with its main office at Bloomington, Illinois, and no jurisdictional question is involved.

On September 27, 1965, the Insurance Workers International Union, AFL-CIO (Union), filed a representation petition with the Board, pursuant to Section 9 (c) of the Act, in which it requested certification as bargaining agent of field claims specialists and field claims representatives assigned to the Company's Bronx, Jackson Heights, Brooklyn and Queens offices (called the Metropolitan group), and also those assigned to the Smithtown and Nassau County offices (called the Nassau-Suffolk group), all of New York State. In addition to the offices thus named by the Union, the Company's Northeastern Region includes nine other claim offices in New York State (called the Upstate group) and fourteen in New Jersey and the New England States.

At the representation hearing the Company moved to dismiss the Union's petition on the ground that the unit sought was inappropriate and suggested that an appropriate unit should consist of either the entire Northeastern Region or, at the minimum, all of the offices in New York State.

The Board found inappropriate the unit sought by the Union and refused to sanction either of those suggested by the Company. Instead, it found two separate units appropriate, one the Metropolitan group and the other the Nassau-Suffolk group, and directed an election in each. The Union won the election in the former unit but lost in the latter. Accordingly, on June 22, 1966, the

Board certified the Union as the bargaining representative of the field claims specialists and field claims representatives employed at the four Metropolitan offices.

On June 29, 1966, following its certification, the Union requested that the Company bargain with it as the representative of the employees in the certified unit. The Company refused the Union's request on the ground that the unit found by the Board was inappropriate. This unfair labor practice proceeding followed. In response to the complaint, the Company admitted its refusal to bargain solely on the ground that the Board's unit determination was inappropriate, whereupon the general counsel filed a "Motion for Summary Judgment and Judgment on the Pleadings" with the Regional Director, who referred the motion to the Board. The Board directed the Company to show cause why such motion should not be granted. The Company opposed the motion and moved for an order transferring the case to a Trial Examiner for a further hearing on the unit issue. The Board found that the Company had presented no issue requiring a hearing, granted the motion for summary judgment and entered the order now in controversy.

The Board on brief states the contested issue:

> "Whether the Board properly found that the Company violated Section 8 (a)(5) and (1) of the Act by refusing to bargain with the certified representative of its employees."

Of course, the ultimate issue for decision is as stated, but its resolution is dependent upon subsidiary issues which are aptly stated in the Company's brief:

> "1. Is the National Labor Relations Board's unit determination—predicated on the 'managerial au-

thority' of a minor supervisor, who has virtually no authority in the area of personnel and labor relations—supported by substantial evidence, and does it accord with the Congressional purposes of Section 9 of the National Labor Relations Act?

"2. Was it error for the Board to designate as appropriate, a bargaining unit which, because of frequent changes in its composition, will undermine efficient and stable collective bargaining?

"3. Did the Board violate Section 10 of the National Labor Relations Act when it refused to grant the Company a hearing in the unfair labor practice proceeding and to consider new evidence establishing the inappropriateness of the Board's unit determination?"

Thus, it is evident that the critical issue is whether the Board's unit determination was appropriate. In considering that issue, we are not unmindful of our limited scope of review. The Board on brief cites many cases in support of two propositions, (1) "Under Section 9 (b) of the Act, the Board has wide discretion in deciding the unit appropriate for purposes of collective bargaining, and when the Board has exercised that discretion reasonably, its determination will not be set aside by a reviewing court," and (2) "The Board's choice among alternative appropriate units will not be disturbed by a reviewing court unless the choice has been made in a manner violative of the Act."

We see no point in discussing the cases cited in support of these general propositions, about which there can be no dispute. Even so, we have the statutory duty, as stated in Section 160 (e) of the Act, "to make and enter a decree enforcing, modifying, and enforcing as so modified,

or setting aside in whole or in part the order of the Board," with the admonition, "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

It is for the reviewing court to decide whether the Board's determination is supported by substantial evidence, whether its discretion was reasonably exercised and whether it disclosed a proper basis for its order. *N.L.R.B.* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 443.

We have read and re-read the Board's decision in the representation proceeding, its findings and conclusions, together with its brief filed in this court, and reach the definite conclusion that its determination of the unit in controversy is not supported by substantial evidence and is clearly erroneous. The Board in its brief, after reciting the facts as found in its decision, states, "Upon the foregoing facts, the Board found that the divisional unit supervised by a divisional claim superintendent is 'the smallest component of the Employer's business structure which may be said to be relatively autonomous in its operation.'"

Such being the situation, particularly in view of our disagreement with the Board, we think a detailed statement of its findings is in order. The statement which follows is taken in the main from its decision.

The national headquarters of the Company, and those with which it is affiliated, are located at Bloomington, Illinois. Basic business, operating and personnel policies are determined at this home office. The next highest stratum of administrative authority is vested in the 21 regional headquarters located throughout the United States and Canada. We are here concerned with the

Northeastern Region which, as noted, has jurisdiction over New York, New Jersey and the New England States.

The Northeastern Region is directed by a regional vice president and his two deputies. The vice president reports directly to the president of the State Farm group in Bloomington. Headquarters of the Northeastern Region are located in Wayne, New Jersey, in offices which house some 500 employees. All of the operations of the State Farm companies conducted in the Northeastern United States are directed and controlled from the Wayne offices, and the staff functions, such as accounting, administrative services and data processing, are performed there.

Under the office of the regional vice president, the business of the Northeastern Region is carried on by four operating divisions—two automobile, one fire and casualty, one life—and one division in charge of the sale of life, automobile and fire insurance. Each of the four operating divisions is under the supervision of a division manager; the sales division is supervised by eight agency directors.

The heavy volume of automobile insurance business and claims service in the region has necessitated the establishment of the two automobile operating divisions referred to. Alike in structure and function, one services claims in New York State and the other services claims in New Jersey and New England. Each division has a service section, located in Wayne, which performs various clerical functions, pertaining mostly to issuance of policies and premium billing. Each also has an underwriting section, located in Wayne, which underwrites new risks and reunderwrites existing business. Finally, each of the two automobile divisions has a claim section, with which we are presently concerned, that is responsible for processing, investigating, negotiating and paying minor claims. The

two claims sections employ a total of about 170 field claims representatives, located throughout the region. Each automobile operating division is in the charge of a division manager, who supervises the claims, service and underwriting functions of the division, subject to the control of the regional vice president.

In the claims section of each automobile operating division, the supervisory authorities below the division managers are the divisional superintendents. The number of these superintendents in each division is subject to change according to the volume of business and geographic distribution of field claims offices in the division; in the claims section of the automobile division responsible for New York State there are three such divisional superintendents, but in the claims section of the New Jersey-New England division, there are only two. In 1956, there was only one divisional superintendent in the New York automobile division. At present, in the New York State division, one of the divisional superintendents supervises those lower echelon supervisors and claims representatives who are attached to the Nassau-Suffolk group offices; the second, those employees who work out of the Metropolitan group offices, and the third, those assigned to the nine other offices scattered throughout the rest of New York State. All divisional superintendents are based in Wayne, New Jersey, and visit the offices subject to their supervision about once every two weeks. In the New York State division, the divisional superintendent for the Nassau-Suffolk group supervises 6 supervisors and 29 claims representatives; the one for the Metropolitan group, 8 supervisors and 32 representatives and the one for the Upstate group, 8 supervisors and 42 representatives.

Each divisional superintendent supervises the instruction of new claims personnel, reviews claims files, and

has the authority to settle claims for amounts greater than those which claims superintendents or claims representatives are allowed to negotiate. The divisional superintendent also makes recommendations about most proposed personnel actions pertaining to the employees within his group.

The Board specifically found:

> "The next link in the descending supervisory chain is represented by the Claim Superintendents.[1] As has been noted, the Upstate and Metropolitan Divisional Superintendents have eight Claim Superintendents working under each of them; the Nassau-Suffolk Divisional Superintendent has six. Thirteen of these 22 Claim Superintendents are based in Wayne, New Jersey. Each has supervisory authority over a specified number of claim representatives, ranging from two to seven and averaging about five. The 13 non-resident Claim Superintendents make weekly visits of about 2 days' duration to the offices where their supervisees are located. The other nine superintendents are based in the claim offices. As a result of this distribution, there are no supervisors stationed in 10 of the field offices in the Region, and in two of the other field offices the resident Claim Superintendents have supervisory authority over only some of the claim representatives in the office, while other employees in the same office are supervised by non-resident supervisors."

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[1] The so-called descending supervisory chain is somewhat confusing. Below the home office at Bloomington, Illinois, is its regional office at Wayne, New Jersey, headed by a regional vice president and two deputies, followed by the division managers, divisional claims superintendents and claims superintendents.

Appendix

The Company's personnel policies are determined at the home office in Bloomington; sick leave, group medical, life and other insurance programs, vacations, credit unions, travel allowances, promotion procedures and similar conditions and benefits of employment. These policies are effectively construed and implemented by the several regional offices. Against the background of policies and practices established by the home office, decisions as to the applicability of these policies and procedures to claims representatives are made by the regional supervisory authorities. Ultimately, most of the final decision-making authority in each region is vested in the office of the regional vice president. For instance, the region makes annual reviews of the performance of each employee for the purpose of determining whether he should be granted a salary increase (within a range predetermined by the home office). The claims superintendent fills out a form to initiate such reviews, giving his comments and recommendations. The divisional superintendent then makes his recommendation in the portion of the form designed for his entry. Finally, the division manager adds his recommendation, and the form is submitted to the office of the regional vice president, where this official or his deputy approves or disapproves the increase.

Evidence was admitted that of 64 transfers of claims representatives from one field office to another within the Northeastern Region for the period from January 1, 1963, to November 1, 1965, most of them were apparently permanent, and the majority occurred within the State of New Jersey. Only five of the transfers occurred within the Metropolitan group of offices, five in the Upstate group and four in the Long Island group. There were eleven transfers between the Metropolitan and Long

Island groups, two of which were temporary. No transfers were effected between upstate and downstate New York offices.

The Board as a prelude to its conclusion cited and relied upon *Quaker City Life Insurance Company,* 134 N.L.R.B. 960, and *Metropolitan Life Insurance Company (Woonsocket, R.I.),* 156 N.L.R.B. No. 113, and cases cited therein. As to these cases, the Board in its decision stated:

> "Looking primarily to the *autonomous* character of the single district office petitioned for in Quaker City, and the overall immediate supervision exercised by the district office manager, we concluded that a unit consisting of the employees in the district office was an appropriate bargaining unit. Since that case, we have found appropriate other single-office units which exhibited a similar degree of *autonomy,* and have also authorized groupings of single offices where considerations of geography or the employer's administrative structure lent coherence to such multiple-office units." (Italics supplied)

Then follows the heart of the Board's decision:

> "The evidence of record in the case before us presents a significantly different picture of field operating procedure from that developed in the insurance agents cases cited above. It seems clear that the smallest component of the Employer's business structure which may be said to be *relatively autonomous* in its operation is not the field claims office, but rather the divisional unit of employees supervised by a Divisional Superintendent. By virtue of the managerial authority reposed in the three

> Divisional Superintendents, who represent a supervisory focal point for their respective groups of 39, 32, and 29 claim representatives, these functionaries appear to exercise powers most closely analogous to those possessed by the district office managers in the earlier cases. A finding, therefore, that bargaining units could properly be demarcated by the supervisory jurisdiction of each Divisional Superintendent would be wholly in keeping with the principles applied in the insurance agents cases." (Italics supplied.)

Thus, this critical paragraph commences with the admission that there is here presented "a significantly different picture of field operating procedure from that developed in the insurance agents cases cited above," but concludes that its unit determination "would be wholly in keeping with the principles applied in the insurance agents cases."

The Board's reasoning rests upon two premises: (1) the unit determination was "relatively autonomous in its operation," and (2) "the managerial authority reposed in the three Divisional Superintendents." It is significant to note that the Board did not find that the unit was autonomous but only that it was "relatively" so, without explanation as to why the qualifying word. Perhaps the explanation can be found in the dictionary, which defines "autonomous" as "having the right or power of self-government; undertaken or carried on without outside control; existing or capable of existing independently." Webster's Seventh New Collegiate Dictionary.

We are convinced that the cases relied upon by the Board are of little if any aid to its conclusion. In both cases the Board specifically found that the district offices

were *autonomous*; that they were located far from the home office; that their office managers were the highest managerial employees in the district offices, with no supervision except that which was provided by the home office, and that the district offices were under the exclusive jurisdiction of the district managers. In contrast, the authority possessed by the divisional claims superintendents was limited in the main to making recommendations. They were under the direct supervision and control not only of the auto division manager but of the regional vice president. The Board found, "Ultimately, most of the final decision-making authority in each Region is vested in the office of the Regional Vice-President."

As shown, the Board evidently recognizes autonomy as an important and perhaps essential factor in the determination of an appropriate bargaining unit. Courts have done likewise. In *N.L.R.B.* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F. 2d 895, this court refused to enforce the Board's order concerned with a single restaurant in an integrated chain because the unit designated was inappropriate. One of the issues involved the finding of the Board that each restaurant was autonomous. As to that issue we stated (page 896):

> "The only factual contention made by petitioner [the Board] which requires notice is that each restaurant has 'autonomy' because each restaurant manager has certain powers. However, the undisputed facts appearing in the record show that a common labor policy affecting all employees is formulated and administered by the president, as chief executive, and certain other officers of the corporations. Reporting to him are three area supervisors each of whom has a share of the Indianapolis res-

> taurants to cover. These area supervisors visit the restaurants frequently."

After reciting the facts in detail, which in our view are more favorable to the Board's contention than those in the instant matter, we held there was no autonomy and stated (page 897), "It is evident to us that the decisions left to the managers do not involve any significant element of judgment as to employment relations," and "It is obvious to us that none of the store managers will be deciding questions affecting the employees in the context of collective bargaining."

In *N.L.R.B.* v. *Purity Food Stores, Inc.*, 376 F. 2d 497 (CA-1), the court refused to enforce the Board's order upon the ground that its unit determination was inappropriate. The Board found a single supermarket to be an appropriate bargaining unit, based on the authority of its manager and the autonomy of the store. The court stated (page 500):

> "The Board rested its conclusion basically on lack of store-wide bargaining history and on its view that the Peabody store was so economically independent of the other retail stores and possessed such 'significant autonomy' within the respondent's overall operation that separation of that store from the others for purposes of collective bargaining would not obstruct centralized control and effective operation of the chain. We cannot agree."

We think the Board's reliance upon the managerial authority of the divisional claims superintendents must be rejected for the same reasons we reject its finding that the unit supervised by them was autonomous. As

previously shown, their authority was limited in the main to making investigations, reports and recommendations. They possessed no significant managerial authority. This is aptly illustrated in the Board's brief in discussing the process by which claims representatives may seek a salary review. The Board states:

> "The claim superintendent initiates such reviews by filling out a prescribed form, in which he includes comments and recommendations. In turn, the divisional claim superintendent will add his recommendation in the portion of the form designated for such use. Finally, the division manager will add his recommendation, and the form will then be submitted to the office of the regional vice president, where either the regional vice president or his deputy will make the final decision."

It is not discernible to us how this procedure furnishes any support for a finding that a divisional claims superintendent is endowed with managerial authority in the area of personnel and labor relations. Other functions performed by a divisional claims superintendent, relied upon by the Board, generally fall in the same category and, if anything, are of even less significance.

The Board's unit determination being inappropriate, it follows that the Company did not violate Sec. 8 (a)(5) and (1) of the Act by refusing to bargain with the Union certified as the representative of that unit. The Company's petition to set aside the order is allowed and, consequently, the Board's petition for its enforcement is denied.

No. 16175

KILEY, *Circuit Judge,* dissenting.

I dissent. I think that the Board's determination of the appropriate bargaining unit was reasonable and well within its discretion, and that the appropriate unit chosen here is consistent with Board decisions in other insurance company cases which have been approved by other courts.

Petitioner is a large centralized insurance company. All of its business policy decisions, including decisions as to sick leave, job benefits, holidays, overtime, recruitment, salary ranges, etc., are made at its home office in Bloomington, Illinois. Petitioner is divided into twenty-one regions, including the Northeastern Region pertinent to this case. The Northeastern Region includes New York, New Jersey, and the New England states. Petitioner's Northeastern Regional headquarters is at Wayne, New Jersey. It is headed by a regional vice-president assisted by two deputy regional vice-presidents. The vice-president directs all operations in the region, including recruitment, interviewing job applicants, promotions, and salaries.

The Northeastern Region is divided into two automobile insurance divisions, one covering New York and the other New Jersey and New England. A division manager heads each of these divisions. The division manager is responsible for overseeing the claim processing operations of the company. He also makes salary and employment recommendations to the regional vice-president.

The New York automobile division is divided into four districts, each headed by a division claims department. The division claims superintendents are each in charge of about five offices, and each superintendent has about thirty-five adjustors under him.

Appendix

The responsibilities of the divisional claims superintendent include: supervision of the instruction of claims personnel under his jurisdiction; training of claims supervisory personnel; examining claims files; recommending company action concerning promotion, salary changes, hiring, and disciplinary action; interviewing and initially screening applicants for claim agent jobs; administering and supervising the overall day to day claims handling within his jurisdiction; and visiting the respective claims field offices on a day to day basis.

The proceedings before the Board in this case began with a representation petition filed by the Union. In the representation proceeding the Union argued that the appropriate unit was a single claims office. The employer, on the other hand, argued that the appropriate unit was the Northeastern Region including all of New York, New Jersey, and New England. The Board's designation of the claims district headed by the divisional claims superintendent as the appropriate unit drew the line between the two extremes.

The Board has a wide discretion in designating appropriate units under the Act, and is not required by the Act to choose the most appropriate unit, but only to choose an appropriate unit within the range of several units which may be appropriate in a given factual situation. The Board may look to various factors to determine what units are appropriate. The company organization, the numerical size of the unit, the geographical distribution of the employees in the unit, the type of work done by the employees in the unit, the responsibilities of the unit supervisor, the organizability of the unit, and the extent to which the unit has already been organized, all may be relevant considerations and no one factor may be determinative. NLRB v. Metropolitan Life Insurance

Company, 380 U.S. 438. Sec. 9(b) itself states that the unit shall be chosen "in order to secure the employees the fullest freedom in exercising the rights guaranteed by this Act."

The unit chosen by the Board in this case contains about thirty-five employees who do similar work under similar conditions; geographically the unit, on the average, covers one-fourth of New York State; the Union has successfully organized one of the units; the leader of the unit chosen is the company official who directly controls and supervises the day to day work of the employees; under the company's organization the next larger unit would, on the average, cover a multi-state area; the smallest unit under the company's organization which has a leader, the regional vice-president, with any formal control over employee policy would cover all of New York, New Jersey, and New England; and the smallest unit where there is substantial control over employee policy, the Bloomington Home Office, is nationwide. Under these circumstances I believe the reasonableness of the Board's determination is clear.

The fact that the next largest unit available under the company's organizational structure covers a multi-state area is of particular significance. In 1944 the Board adopted a policy of refusing to authorize an appropriate unit which was less than state-wide, on the theory that this would promote the organization of employees by unions. Metropolitan Life Insurance Co., 56 NLRB 1635. The Board, however, subsequently abandoned this rule because

> As a practical matter . . . such state-wide or company-wide organization has not materialized, and the result of the rule has been to arrest the organizational development of insurance agents to an ex-

> tent certainly never contemplated by the Act, or for that matter by the Board that decided the *Metropolitan Life* case. Quaker City Life Insurance Co., 134 NLRB 960, 962.

The majority decision here would prevent the Board from choosing a less than state-wide unit for bargaining and would therefore "arrest the organizational development of insurance agents" in highly centralized insurance companies and would prevent the employees from enjoying "the fullest freedom in exercising the rights guaranteed by" the National Labor Relations Act, 29 U.S.C. 159(b).

Finally, the majority decision is inconsistent with the decisions of the Fourth Circuit in NLRB v. Quaker City Life Insurance Co., 319 F. 2d 690, and Singer Sewing Machine Co. v. NLRB, 329 F. 2d 200. In *Quaker City* the duties of the head of the unit chosen as appropriate by the Board were described by the court as follows:

> The District Manager generally supervises the day to day operations of the office, operating under general rules set by the home office. He recommends the hiring, firing, and disciplining of the office employees and he may, under certain conditions, fire summarily. He trains the local employees, and, within limits set out by the company, makes recommendations as to promotions, increases and allowances.

That authority does not significantly differ from the authority of the divisional claims superintendent in the case before us, but in *Quaker City* the Board's choice of an appropriate bargaining unit was approved. Moreover, in *Quaker City* the District Manager had only six employees under him, while the supervisor in this case has approxi-

mately five times that number. The head of the unit in *Singer* also had substantially the same power as the divisional claims superintendent here, and in that case the Board's unit determination was also approved.[1]

The Board's order, before us, is not an abuse of its discretion and does not offend the Act's limitation that designation of an appropriate unit must not be controlled by the extent to which the unit has already been organized. NLRB v. Quaker City Life Insurance Co., 319 F. 2d 690.

I would, therefore, enforce the Board's order.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

[1] In *Singer* the Board's order was denied enforcement on other grounds.

Appendix

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 16175 SEPTEMBER TERM, 1968 SEPTEMBER SESSION, 1968

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *Petitioner,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	Petition to Review and Set Aside an Order of the National Labor Relations Board. On Rehearing en banc.

MARCH 26, 1969

Before CASTLE, *Chief Judge,* MAJOR and HASTINGS, *Senior Circuit Judges,* KILEY, SWYGERT, FAIRCHILD, CUMMINGS and KERNER, *Circuit Judges.*

KILEY, *Circuit Judge:* The National Labor Relations Board found that State Farm Mutual Automobile Insurance Company violated Sections 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain with the Insurance Workers International Union, AFL-CIO,

which had been certified to represent a unit of employees. The Board ordered the Company to bargain with the Union. The Company petitioned this court to review and set aside the Board's order, and the Board cross-petitioned for enforcement of its order. A panel of this court, in an opinion (one judge dissenting) issued August 8, 1968, set aside the Board's order. Subsequently, this court granted the Board's petition for rehearing en banc. We now enforce the Board's order.

Petitioner is a multi-state insurance company. All of its business decisions, such as job benefits, holidays, overtime, sick leave, recruitment and salary ranges are made at its home office in Bloomington, Illinois. Petitioner is divided into twenty-one regions across the country. The Northeastern Region, pertinent to this case, comprises New York, New Jersey, and the New England states, and its headquarters is at Wayne, New Jersey. It is headed by a regional vice-president assisted by two deputy regional vice-presidents. The vice-president directs all operations in the region, including recruitment, interviewing job applicants, promotions, and salaries.

The Northeastern Region is divided into four divisions, including two automobile insurance divisions, one covering New York and the other New Jersey and New England. A division manager, who is responsible for overseeing the claim processing operations of the company, heads each division. He also makes salary and employment recommendations to the regional vice-president.

The New York automobile division is divided into four districts, each headed by a division claims superintendent, who is in charge of about five offices and supervises about thirty-five adjusters. The responsibilities of a divisional claims superintendent include: supervising the instruction of claims personnel under his jurisdiction; training the

claims supervisory personnel; examining claims files; recommending company action concerning promotion, salary changes, hiring, and disciplinary action; interviewing and initially screening applicants for claims agent jobs; administering the over-all day to day claims handling within his jurisdiction; and visiting the claims field offices.

The proceedings before us began with a representation petition filed by the Union. The Company moved to dismiss the petition on the ground of inappropriateness of the unit. The Board rejected both the Union's contention that the smallest appropriate unit was a single claims office, and the Company's contention that the smallest appropriate unit was the Northeastern Region, or, alternatively, the New York State unit. The Board designated "the divisional unit of employees supervised by a divisional superintendent" as the smallest appropriate unit.

Thereafter the Board conducted representational elections in two claims districts in New York. In the unit before us, the Union won the election and was certified as the bargaining representative.

The Union then requested the Company to bargain. The Company refused on the ground that the unit found by the Board was inappropriate. The Union filed an unfair labor practice charge alleging an unlawful refusal to bargain. The General Counsel issued a complaint, and the Company's response admitted the refusal to bargain, reasserting the inappropriateness of the unit. The Board granted the General Counsel's "Motion for Summary Judgment and Judgment on the Pleadings," over the Company's objection that it was entitled to a further hearing on the appropriate unit and issued the order which is now before this court.

The Company contends that the order should be set aside because the unit determination is unreasonable and the Board's refusal to hold the further hearing requested by the Company violated Section 10(b) of the National Labor Relations Act.[1]

The Board has a wide discretion in designating appropriate units. It is not required by the Act to choose the most appropriate unit, but only to choose an appropriate unit within the range of several appropriate units in a given factual situation. The Board may look to various factors to determine what units are appropriate. The company organization, the numerical size of the unit, the geographical distribution of the employees in the unit, the type of work done by the employees in the unit, the responsibilities of the unit supervisor, the organizability of the unit, and the extent to which the unit has already been organized, are all relevant considerations and no one factor is determinative. *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965). Section 9(b) itself states that the unit shall be chosen "in order to secure the employees the fullest freedom in exercising the rights guaranteed by this Act." Where the facts underlying a Board determination of an appropriate unit are not contested, the Board's determination will not be overturned unless it is arbitrary or unreasonable. *May Dept. Stores Co.* v. *NLRB*, 326 U.S. 376 (1945); *NLRB* v. *Krieger-Ragsdale & Co.*, 379 F. 2d 517 (7th Cir. 1967), *cert. denied*, 389 U.S. 1041 (1968).

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[1] 29 U.S.C. § 160

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The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint.

* * *

Appendix

The unit chosen by the Board in this case contains about thirty-five employees who do similar work under similar conditions; geographically the unit, on the average, covers one-fourth of New York State; the Union has successfully organized one of the units; the leader of the unit chosen is the Company official who directly controls and supervises the day to day work of the employees; under the Company's organization the next larger unit would, on the average, cover a multi-state area; the smallest unit under the Company's organization which has a leader, the regional vice-president, with any formal control over employee policy would cover all of New York, New Jersey, and New England; and the smallest unit where there is substantial control over employee policy, the Bloomington Home Office, is nation-wide. Under these circumstances, the reasonableness of the Board's determination is clear.

The fact that the next largest unit available under the Company's organizational structure covers a multi-state area is of particular significance. In 1944 the Board adopted a policy of refusing to authorize an appropriate unit in the insurance industry which was less than state-wide, on the theory that this would promote the organization of employees by unions. *Metropolitan Life Ins. Co.*, 56 N.L.R.B. 1635. (1944) The Board, however, subsequently abandoned this rule because

> As a practical matter . . . such state-wide or company-wide organization has not materialized, and the result of the rule has been to arrest the organizational development of insurance agents to an extent certainly never contemplated by the Act, or for that matter by the Board that decided the *Metropolitan Life* case. *Quaker City Life Ins. Co.*, 134 N.L.R.B., 960, 962 (1961).

Adoption of the Company's position here would prevent the Board from choosing a less than state-wide unit for bargaining and would therefore "arrest the organizational development of insurance agents" in highly centralized insurance companies and would prevent the employees from enjoying "the fullest freedom in exercising the rights guaranteed by" the National Labor Relations Act, 29 U.S.C. 159(b). The *Quaker City* rationale also refutes Company's alternative contention that the most appropriate unit covers all of New York State.

Finally, the Board's decision is consistent with other Board decisions that the courts have previously approved. *NLRB* v. *Quaker City Life Ins. Co.*, 319 F. 2d 690 (4th Cir. 1963); *Singer Sewing Machine Co.* v. *NLRB*, 329 F. 2d 200 (4th Cir. 1964). In *Quaker City* the duties of the head of the unit chosen as appropriate by the Board were described by the court as follows:

> The District Manager generally supervises the day to day operations of the office, operating under general rules set by the home office. He recommends the hiring, firing, and disciplining of the office employees and he may, under certain conditions, fire summarily. He trains the local employees, and, within limits set out by the company, makes recommendations as to promotions, increases and allowances.

That authority does not significantly differ from the authority of the divisional claims superintendent in the case before us, and in *Quaker City* the Board's choice of an appropriate bargaining unit was approved. Moreover, in *Quaker City* the district manager had only six employees under him, while the supervisor in this case has approximately five times that number. The head of the unit in

Singer also had substantially the same power as the divisional claims superintendent here, and in that case the Board's unit determination was also approved.[2]

The Company relies mainly on *NLRB* v. *Frisch's Big Boy Ill-Mar. Inc.*, 356 F. 2d 895 (7th Cir. 1966), and on *NLRB* v. *Purity Food Stores, Inc.*, 376 F. 2d 497 (1st Cir.), *cert. denied*, 389 U.S. 959 (1967). In *Frisch* this court rejected the Board's determination that a single retail store was an appropriate unit, where the Company had ten stores in Indianapolis, Indiana. The store managers there had considerably less authority than the district managers here. Yet the court recognized that an eleventh store located sixty miles away in Muncie, Indiana, might constitute a separate bargaining unit.

In *Purity* the First Circuit rejected the Board's determination that a single retail outlet constituted an appropriate unit where the Company operated a chain of seven outlets, all located within thirty miles of the Company's central office. The court stated that Purity was "a small, compact, homogeneous, centralized, and integrated operation" and that "the 'independence' of the stores . . . amounts to no more than a few miles of physical separation." Neither of these cases is controlling or persuasive on the facts here.

The Board states that in each similar case since *Quaker City* it has relied primarily upon the "autonomous" character of the "single district office" and the "over-all immediate supervision" exercised by the district office manager. In each case, on differing facts, the district office head may possess varying degrees of autonomy depending upon the degree to which he may exercise significant managerial power over the employees he superintends.

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[2] In *Singer* the Board's order was denied enforcement on other grounds.

We think the Board could find sufficient autonomy and supervisory authority here to justify its choice of an appropriate unit.

The Board did not abuse its discretion in entering the order before us, and the order does not offend the Act's limitation that designation of an appropriate unit must not be controlled by the extent to which the unit has already been organized. *NLRB* v. *Quaker City Life Ins. Co.*, 319 F. 2d 690 (4th Cir. 1963). We conclude that we should not set aside the Board's order on the ground that the unit chosen was inappropriate.

In opposing the General Counsel's motion for summary judgment, the Company moved for an order transferring the case to a Trial Examiner for further hearing on the unit issue. The Board denied the motion, finding that no issue had been presented requiring a hearing. In the Board's view, the factual issues concerning the appropriateness of the unit were resolved in the representation proceeding, and absent newly discovered or previously unavailable evidence, the issues need not be relitigated.

The Company insisted that since the Board, in the representation proceeding, chose as appropriate a unit advocated by neither party, the Company did not present evidence in its possession with respect to that unit. The Company claimed it was entitled to an opportunity to present this evidence in the unfair labor practice proceedings.

The Board denied the further hearing on two grounds: It stated that the evidence sought to be introduced was available at the representation proceeding, and the Company's failure to produce it at that time precluded introduction of the evidence on the same issue in the unfair

labor practice proceeding. The Board also concluded that the proffered evidence was merely cumulative to evidence heard in the representation proceeding. We agree with the Board. *NLRB* v. *International Die Sinker's Conference,* 402 F. 2d 407, 411 (7th Cir. 1968).

A representation proceeding is not adversary in the usual sense, but is designed primarily to enable the Board to fulfill its statutory function with respect to the certification of bargaining representatives. Part of the function is, of course, determination of an appropriate bargaining unit. When that determination is an issue in a representation proceeding, all persons concerned have the duty to produce all information relevant to the issue. The Board's determination is not confined to the units suggested by the parties, but it may choose any unit which it reasonably deems appropriate. *Local 620, Allied Industrial Workers* v. *NLRB,* 375 F. 2d 707, 710-11 (6th Cir. 1967); *S. D. Warren Co.* v. *NLRB,* 353 F. 2d 494, 499 (1st Cir. 1965).

The issue of an appropriate unit was the subject of an extensive hearing in the representation proceeding. There was substantial evidence introduced of the entire organizational structure of the Company. Having failed to produce relevant evidence it possessed in that proceeding, the Company had no right to another opportunity to present evidence at the expense of the exercise of the employees' collective bargaining rights. *Rockwell Mfg. Co., Kearney Div.* v. *NLRB,* 330 F. 2d 795, 797-98 (7th Cir. 1964).

The evidence proffered in the unfair labor practice hearing was intended to show that the unit chosen in the representation hearing was subject to change in the geographical area supervised by divisional claims superintendents. But in the representation proceeding it was specifically found that "The number of these superinten-

dents in each division is subject to change according to the volume of business and geographic distribution of field claims offices in the division; . . ." The Board, therefore, did not abuse its discretion in denying the motion for a further hearing, as no useful purpose would have been served by receiving the Company's evidence. *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 157-58 (1940).

Having concluded that none of the grounds urged by the Company for setting aside the order is valid, the Board's order will be enforced.

No. 16175

MAJOR, *Senior Circuit Judge*, dissents, with which HASTINGS, *Senior Circuit Judge*, concurs.

I feel obliged to dissent from the majority opinion rendered on the Board's petition for rehearing *en banc* which allows the Board's petition for enforcement, thereby nullifying the August 8, 1968 panel decision of this court.

This dissent is directed squarely at the decision under review, with the findings and conclusions contained therein. I am not concerned with the many cases which stand for the well recognized proposition that our scope of review is limited and that the Board has a wide discretion in determining an appropriate bargaining unit. Such cases are not controlling here because the Board's order, in my view, is based upon a fallacious premise and its decision is clearly erroneous, arbitrary and capricious.

Furthermore, I am not impressed with the Board's twofold argument in support of its unit determination, apparently embraced by the majority, (1) that it is in ac-

cordance with its policy, and (2) that owing to the circumstances of the case it would have great difficulty in determining a more appropriate unit. I realize the Board's policy is entitled to serious consideration but I disagree with the idea that it can be utilized as a substitute for facts, which it appears the Board would have us do. Likewise, the fact that the Board might have difficulty in determining some other unit as appropriate furnishes no justification for its determination that the unit under consideration is appropriate.

In the beginning it is well to keep in mind what the Board characterizes as the descending supervisory chain: (1) the company's home office at Bloomington, Illinois; (2) its regional office at Wayne, N. J.; (3) its division managers; (4) its divisional claims superintendents, and (5) its claims superintendents. The functions of each link of this chain are described in the Board's decision as follows:

> "National personnel policies are determined at the home office in Bloomington; sick leave, group medical, life, and other insurance programs, vacations, credit unions, travel allowances, promotion procedures, and similar conditions and benefits of employment. These policies are effectively construed and implemented by the several regional offices. Against the background of policies and practices established by the home office, decisions as to the applicability of these policies and procedures to claim representatives are made by the regional supervisory authorities. *Ultimately, most of the final decision-making authority in each Region is vested in the office of the Regional Vice-President.* For instance, the Region makes annual reviews of the performance of each employee, for the purpose

of determining whether he should be granted a salary increase (within a range predetermined by the home office). The Claim Superintendent will fill out a form to initiate such reviews, giving its comments and recommendations. The *Divisional Superintendent* will then make his recommendation in the portion of the form designed for his entry. Finally, the Division manager will add his recommendation, and the form will then be submitted to the office of the Regional Vice-President, where this official or his deputy will approve or disapprove the increase." (Italics supplied.)

It states:

"Looking primarily to the *autonomous* character of the single district office petitioned for in Quaker City [134 N.L.R.B. 960], and the overall immediate supervision exercised by the district office manager, we concluded that a unit consisting of the employees in the district office was an appropriate bargaining unit. Since that case, we have found appropriate other single-office units which exhibited a similar degree of *autonomy*, and have also authorized groupings of single offices where considerations of geography or the employer's administrative structure lent coherence to such multiple-office units." (Italics supplied.)

Then follows the heart of the decision:

"The evidence of record in the case before us presents a significantly different picture of field operating procedure from that developed in the insurance agents' cases cited above. It seems clear that the smallest component of the Employer's

business structure which may be said to be relatively *autonomous* in its operation is not the field claims office, but rather the divisional unit of employees supervised by a Divisional Superintendent. By virtue of the *managerial* authority reposed in the three Divisional Superintendents, who represent a supervisory focal point for their respective groups of 39, 32, and 29 claim representatives, these functionaries appear to exercise powers most closely analogous to those possessed by the district office managers in the earlier cases. A finding, therefore, that bargaining units could properly be demarcated by the supervisory jurisdiction of each Divisional Superintendent would be wholly in keeping with the principles applied in the insurance agents cases." (Italics supplied.)

Thus, the Board concedes that the operating procedure in this case "presents a significantly different picture" from that of the insurance agents cases upon which it relies, but nevertheless concludes that its unit determination "would be wholly in keeping with the principles" applied in such cases.

Neither on brief nor in oral argument before this court did the Board criticize or take issue with a statement contained in our panel decision:

"The Board's reasoning rests upon two premises: (1) the unit determination was 'relatively autonomous in its operation,' and (2) 'the managerial authority reposed in the three Divisional Superintendents.' It is significant to note that the Board did not find that the unit was autonomous but only that it was 'relatively' so, without explanation as

to why the qualifying word. Perhaps the explanation can be found in the dictionary which defines 'autonomous' as 'having the right or power of self-government; undertaken or carried on without outside control; existing or capable of existing independently.' Webster's Seventh New Collegiate Dictionary."

In my judgment, the record is devoid of any proof that the unit determined by the Board possessed autonomy, "relative autonomy" as found in its decision, or "substantial autonomy" as stated in its brief. On the contrary, the record clearly demonstrates that the unit determined was non-autonomous.

The Board in its decision states that "sick leave, group medical, life and other insurance programs, vacations, credit unions, travel allowances, promotion procedures, similar conditions and benefits of employment" are established in the home office and "are effectively construed and implemented by the several regional offices." The Board further found that "decisions as to the applicability of these policies and procedures" are "vested in the office of the Regional Vice President."

Further support for the view that the divisional claim superintendents were without managerial authority to resolve issues subject to collective bargaining is shown by a statement in the Board's original brief:

"Most of the final decision-making authority in each Region ultimately resides in the office of the regional vice president. Thus, for example, the Region annually reviews each claims representative's performance for the purpose of determining whether he should be granted a salary increase (within a

> range established by the home office in Bloomington). The claim superintendent initiates such reviews by filling out a prescribed form, in which he includes comments and recommendations. In turn, the *divisional claim superintendent* will add his recommendation in the portion of the form designated for such use. Finally, the division manager will add his recommendation, and the form will then be submitted to the office of the regional vice president or his deputy will make the final decision." (Italics supplied.)

In short, the divisional claim superintendents were without authority to make any decisions on matters which might be involved in collective barbaining. On such matters they accepted recommendations from those below (claim superintendents); approved or disapproved and passed them on to those above (division managers), and received orders and directions from those above which they executed in an administrative but not in a managerial capacity.

There are numerous court decisions which support the view that the autonomous nature of the unit determined and the managerial authority of the divisional claim superintendents, admittedly the basis for the Board's decision, should be rejected.

In *N.L.R.B.* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F. 2d 895, this court refused to enforce the Board's order concerned with a single restaurant in an integrated chain because the unit designated was inappropriate. The main issue in the case was whether the unit determined was autonomous, as found by the Board. Relative to this issue we stated (page 896):

"The only factual contention made by petitioner [the Board] which requires notice is that each restaurant has *'autonomy'* because each restaurant manager has certain powers. However, the undisputed facts appearing in the record show that a common labor policy affecting all employees is formulated and administered by the president, as chief executive, and certain other officers of the corporations. Reporting to him are three area supervisors each of whom has a share of the Indianapolis restaurants to cover. Those area supervisors visit the restaurants frequently." (Italics supplied.)

In deciding this issue we stated (page 897):

"It is evident to us that the decisions left to the managers do not involve any significant element of judgment as to employment relations. * * *

"It is obvious to us that none of the store managers will be deciding questions affecting the employees *in the context of collective bargaining.*" (Italics supplied.)

The majority opinion, in the attempt to distinguish this case on its facts, states, "The store managers there had considerably less authority than the district managers here." With this statement I disagree but, in any event, the pertinent point is the court's reasoning and conclusion, which read as though written for this case.

In *N.L.R.B.* v. *Purity Food Stores, Inc.*, 376 F. 2d 497, 501, the First Circuit cited with approval our opinion in *Frisch's* and refused to enforce the Board's order on the ground that its unit determination was inappropriate. The Board found a single supermarket to be an appro-

priate bargaining unit, based on the authority of the manager and the *autonomy* of the store. In rejecting the Board's determination the court stated (page 500):

> "The Board rested its conclusion basically on lack of store-wide bargaining history and on its view that the Peabody store was so economically independent of the other retail stores and possessed such *'significant autonomy'* within the respondent's over-all operation that separation of that store from the others for purposes of *collective bargaining* would not obstruct centralized control and effective operation of the chain. We cannot agree." (Italics supplied.)

The Board in its brief, in support of the instant petition, states:

> "* * * individual cases in which the courts of appeals have set aside such determinations as arbitrary or capricious may be regarded either as proper reversals of administrative action, under all the circumstances, or as aberrational abuses of judicial power."

In a footnote the Board states:

> "For purposes of the instant petition for rehearing, it is irrelevant whether the Court's decision in *N.L.R.B.* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F. 2d 895 (1966) is regarded as the former or the latter."

While the Board does not state in which category it places this court, the implication is plain. Even so, our feelings are soothed by the opinion of the Fifth Circuit in *N.L.R.B.* v. *Davis Cafeteria, Inc.*, 396 F. 2d 18. In that

case the court refused to enforce the Board's order on the ground that the bargaining unit selected was inappropriate. Referring to *Frisch's* and *Purity,* the court stated (page 20):

> "In view of the *elucidating opinions in the Purity Foods* case, in *N.L.R.B.* v. *Frisch's Big Boy Ill-Mar, Inc.,* supra, * * * it would serve no precedental value for us to repeat what we have previously said, or what the First and Seventh Circuits *have already so well said.* In the circumstances of this case, labor policy is centrally determined, and where local managers *do not have authority to decide questions which would be subjects of collective bargaining,* the two respondent cafeterias do not constitute an appropriate bargaining unit." (Italics supplied.)

Called to our attention subsequent to the instant hearing *en banc* is a decision of the Second Circuit in *N.L.R.B.* v. *Solis Theatre Corp. and Interboro Circuit, Inc.,* decided November 14, 1968. In that case the court refused enforcement of the Board's order on the ground that the Board improperly determined the bargaining unit. Concluding its statement of the facts, the court stated (page 272, slip opinion):

> "It appears, therefore, that instead of being in a desion making position, the 'manager' has little or no authority on labor policy but is subject to detailed instructions from the central office.
>
> "The Courts of Appeals have been reluctant to sanction bargaining units whose managers lack the authority to resolve issues which would be the subject of collective bargaining."

Following this statement, the court cites with approval our opinion in *Frisch's,* the First Circuit opinion in *Purity,* and the Fifth Circuit opinion in *Davis.*

I would deny enforcement of the Board's order for reasons so clearly revealed in its decision.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

Appendix

Decision and Direction of Elections

158 NLRB No. 84

D-8717
New York, N. Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 2-RC-14145

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Employer,

—and—

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO,

Petitioner.

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Nathaniel H. Janes, Hearing Officer. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer filed a brief in support of its position.

Upon the entire record in this case, the National Labor Relations Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The Petitioner requests an election in a single bargaining unit consisting of all field claim specialists and field claim representatives assigned to the Employer's Bronx,[1] Jackson Heights, Brooklyn, and Queens offices (herein referred to as the Metropolitan group) and also those assigned to the Smithtown and Nassau County offices (herein referred to as the Nassau-Suffolk group).

In the Employer's Northeastern Region, aside from the offices petitioner for, the Employer has nine other claim offices in New York State (herein referred to as the Upstate group) and some 14 other claim offices in New Jersey and the New England States. In moving to dismiss the petition, the Employer appears to contend that the appropriate unit should encompass the entire Northeastern Region, but that in any event no less than all of the offices in New York State comprise the minimally appropriate unit.

In our opinion, the unit requested by the Petitioner is not an appropriate one within the meaning of Section 9(b) of the Act, and we shall instead direct elections in the units described herein below.

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[1] The office which services both the southern tip of Westchester County and the Bronx is located in Bronxville, which is in Westchester County. The record refers to this office as the "Bronx" office.

Appendix

The national headquarters of the Employer, and the companies with which it is affiliated, are located in Bloomington, Illinois. Basic business, operating, and personnel policies are determined at this home office. The next highest stratum of administrative authority is vested in the 21 regional headquarters located throughout the United States and Canada. We are presently concerned with the Northeastern Region, which, as noted, has jurisdiction over New York, New Jersey, and the New England States.

The Northeastern Region is directed by a Regional Vice-President and his two deputies. The Vice-President reports directly to the President of the State Farm group in Bloomington. Headquarters of the Northeastern Region are located in Wayne, New Jersey, in offices which house some 500 employees. All of the operations of the State Farm companies conducted in the Northeastern United States are directed and controlled from the Wayne offices, in addition to the staff functions, such as accounting, administrative services, and data processing, which are performed there.

Under the office of the Regional Vice-President, the business of the Northeastern Region is carried on by five divisions—two automobile operating divisions, one fire and casualty operating division, one life operating division, and one division in charge of the sale of life, automobile and fire insurance. Each of the four operating divisions is under the direction of a Division Manager; the sales division is supervised by eight Agency Directors.

The heavy volume of automobile insurance business and claims service in the Region has necessitated the establishment of the two automobile operating divisions referred to. Alike in structure and function, one services claims in New York State and the other services claims

in New Jersey and New England. Each division has a service section, located in Wayne, which performs various clerical functions, pertaining mostly to issuance of policies and premium billing. Each also has an underwriting section, located in Wayne, which underwrites new risks and reunderwrites existing business. Finally, each of the two automobile divisions has a claim section, with which we are presently concerned, that is responsible for processing, investigating, negotiating, and paying claims. The two claims sections employ a total of about 170 field claim representatives, located throughout the Region. The unit sought by the petitioning union covers some, but not all, of the claim representatives employed by the claims section of the New York automobile operating division.

As we have noted, each automobile operating division is in the charge of a Division Manager, who supervises the claims, service, and underwriting functions of the Division, subject to the control of the Regional Vice-President.

In the claims section of each automobile operating division, the next line of supervisory authority below the Division Manager are the Divisional Superintendents. The number of these superintendents in each division is subject to change according to the volume of business and geographic distribution of field claims offices in the division; in the claims section of the automobile division responsible for New York State, there are three such Divisional Superintendents, but in the claims section of the New Jersey-New England division, there are only two. In 1956, there was only a single Divisional Superintendent in the New York automobile division. Presently, in the New York State division, one of the Divisional Superintendents supervises those lower echelon supervisors and claim representatives who are attached to the

Nassau and Smithtown offices; the second, those employees who work out of the Queens, Jackson Heights, Brooklyn, and Bronx offices; and the third, those employees assigned to the nine other offices scattered throughout the rest of New York State. All Divisional Superintendents are based in Wayne, New Jersey, and visit the offices subject to their suprevision about once every 2 weeks. In the New York State division, the Divisional Superintendent for the Nassau-Suffolk group supervises 6 supervisors and 29 claim representatives; the one for the Metropolitan group, 8 supervisors and 32 representatives; and the one for the Upstate group, 8 supervisors and 42 representatives.

The record establishes that each Divisional Superintendent supervises the instruction of new claims personnel, reviews claims files, and has the authority to settle claims for amounts greater than those which claim superintendents or claim representatives are allowed to negotiate. The Divisional Superintendent also makes recommendations about most proposed personnel actions pertaining to the employees within his group.

The next link in the descending supervisory chain is represented by the Claim Superintendents. As has been noted, the Upstate and Metropolitan Divisional Superintendents have eight Claim Superintendents working under each of them; the Nassau-Suffolk Divisional Superintendent has six. Thirteen of these 22 Claim Superintendents are based in Wayne, New Jersey. Each has supervisory authority over a specified number of claim representatives, ranging from two to seven and averaging about five. The 13 non-resident Claim Superintendents make weekly visits of about 2 days' duration to the offices where their supervisees are located. The other nine superintendents are based in the claim offices. As a result

of this distribution, there are no supervisors stationed in 10 of the field offices in the Region, and in two of the other field offices the resident Claim Superintendents have supervisory authority over only some of the claim representatives in the office, while other employees in the same office are supervised by non-resident supervisors.

National personnel policies are determined at the home office in Bloomington; sick leave, group medical, life, and other insurance programs, vacations, credit unions, travel allowances, promotion procedures, and similar conditions and benefits of employment. These policies are effectively construed and implemented by the several regional offices. Against the background of policies and practices established by the home office, decisions as to the applicability of these policies and procedures to claim representatives are made by the regional supervisory authorities. Ultimately, most of the final decision-making authority in each Region is vested in the office of the Regional Vice-President. For instance, the Region makes annual reviews of the performance of each employee, for the purpose of determining whether he should be granted a salary increase (within a range predetermined by the home office). The Claim Superintendent will fill out a form to initiate such reviews, giving its comments and recommendations. The Divisional Superintendent will then make his recommendation in the portion of the form designed for his entry. Finally, the Division Manager will add his recommendation, and the form will then be submitted to the office of the Regional Vice-President, where this official or his deputy will approve or disapprove the increase.

Evidence was admitted of 64 transfers of claim representatives from one field office to another within the Northeastern Region for the period from January 1, 1963,

to November 1, 1965. Most of the transfers were apparently permanent, and the majority occurred within the State of New Jersey. Only five of the transfers occurred within the Metropolitan group of offices, five in the Upstate group, and four in the Long Island group. There were 11 transfers between the Metropolitan and Long Island groups, two of which were temporary. No transfers were effected between upstate and downstate New York offices.

The Petitioner, as stated above, seeks a single unit encompassing all of the Employer's six claims offices in lower New York State. Sixty-one of the 103 claim representatives in the New York operating division work in these offices. As we have found, the Employer has administratively partitioned the claims section of its New York operating division into three distinct groups, supervised by three Divisional Superintendents; the offices covered by the instant petition constitute all of the offices under the jurisdiction of two of these Divisional Superintendents. Of the offices in the third group, which is under the aegis of the remaining Divisional Superintendents, the next closest office to Bronxville, the northernmost office in the unit sought by the petition, is the one located in Newburgh, more than 40 miles from Bronxville. Proceeding northerly, the next office after Newburgh is found in Albany, and the rest of the claim offices in New York State —Penfield, Syracuse, Ithaca, Utica, Binghamton, Jamestown, and Buffalo—are strung throughout the northern and western parts of the state.

In *Quaker City Life Insurance Company,* 134 NLRB 960, we decided to abandon the rule earlier adopted in *Metropolitan Life Insurance Company,* 56 NLRB 1635, that bargaining units of insurance agents would be deemed appropriate only if state or companywide in

scope. Looking primarily to the autonomous character of the single district office petitioned for in *Quaker City,* and the overall immediate supervision exercised by the district office manager, we concluded that a unit consisting of the employees in the district office was an appropriate bargaining unit. Since that case, we have found appropriate other single-office units which exhibits a similar degree of autonomy, and have also authorized groupings of single offices where considerations of geography or the employer's administrative structure lent coherence to such multiple-office units. See *Metropolitan Life Insurance (Woonsocket R. I.)*, 156 NLRB No. 113, and cases cited therein.

The evidence of record in the case before us presents a significantly different picture of field operating procedure from that developed in the insurance agents cases cited above. It seems clear that the smallest component of the Employer's business structure which may be said to be relatively autonomous in its operation is not the field claims office, but rather the divisional unit of employees supervised by a Divisional Superintendent. By virtue of the managerial authority reposed in the three Divisional Superintendents, who represent a supervisory focal point for their respective groups of 39, 32, and 29 claim representatives, these functionaries appear to exercise powers most closely analogous to those possessed by the district office managers in the earlier cases. A finding, therefore, that bargaining units could properly be demarcated by the supervisory jurisdiction of each Divisional Superintendent would be wholly in keeping with the principles applied in the insurance agents cases.

A unit comprising all three divisions, as contended for by the Employer, also would be appropriate for bargaining, in view of the facts that such a unit would include

all claim representatives responsible to the Division Manager, the chief supervisor in the New York Automobile Operating Division, and, as well, would encompass all representatives in a clearly-delimited geographical area, the State of New York. In addition, a unit comprising the entire Northeastern Region, also as contended for by the Employer, would be appropriate. But these considerations do not negate each other, nor do they refute the appropriateness of still other units of the Employer's employees. "There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate'." *Morand Brothers Beverage Company,* 91 NLRB 409, 418.

In requesting a single unit in which only two of the three divisions would be represented, however, the Petitioner asks for neither fish nor fowl. The Board will itself establish a single unit of separate appropriate units only where the amalagamated unit is coherent and sensible for collective bargaining from the standpoint of geographic considerations or the employer's administrative or operational structure. But if two or more appropriate units are to merge (and, to some extent, sacrifice) their separate identities in a larger single unit, the resultant unit should encompass *all* similarly-situated units in order to present some geographic or administrative coherence.

The unit requested by the Petitioner in this proceeding fails to meet these standards. Consideration of the geographic and administrative factors makes it clear that the Petitioner has asked for either too much or too little by seeking to combine into a single unit only two of the three divisions. The Employer's organizational structure rationally compels the conclusion that if the Petitioner wishes

an election in such a combined unit, applying the principles enunciated above, it must as well include the third division comprising the Upstate New York employees. On the other hand, since, on the basis of the petition, it appears that the Petitioner is primarily interested in representing the six downstate offices, it would be entitled to, and we shall hereinafter direct, elections in two separate appropriate divisional units: one comprising the four Metropolitan offices, and the other, the two Nassau-Suffolk offices. The elections will be held subject to a sufficient showing of interest by the Petitioner in each unit. If the Petitioner indicates a desire for a statewide election, we would direct an election in that unit, again subject to a proper showing of interest.

Accordingly, we find that the following employees of the Employer constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

1. All field claim specialists and field claim representatives employed by the Employer Assigned to the Bronxville, Jackson Heights, Queens, and Brooklyn offices, excluding superintendents and all other managerial and supervisory personnel, clerical employees and guards as defined in the Act.

2. All field claim specialists and field claim representatives employed by the Employer assigned to the Smithtown (Suffolk County) and Nassau County offices, excluding superintendents and all other managerial and supervisory personnel, clerical employees and guards as defined in the Act.

Appendix

DIRECTION OF ELECTIONS

Subject to a proper showing of interest in each unit by the Petitioner, elections by secret ballot shall be conducted among the employees in the units found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 2 shall direct and supervise the elections, subject to the National Labor Relations Board Rules and Regulations, Series 8, as amended. Eligible to vote are those in the units who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[2] Those eligible shall

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[2] Election eligibility lists, containing the names and addresses of all the eligible voters, must be filed by the employer with the Regional Director for Region 2 within 7 days after the date of this Decision and Direction of Elections. These lists may initially be used by the Regional Director to assist in determining adequate showings of interest. The Regional Director shall make a list available to all parties to an election when he shall have determined that the Petitioner has made an adequate showing of interest in the unit.

vote whether or not they desire to be represented for collective-bargaining purposes by Insurance Workers International Union, AFL-CIO.

Dated, Washington, D. C., May 16, 1966.

.....
Frank W. McCulloch, Chairman

.....
John H. Fanning, Member

.....
Gerald A. Brown, Member

.....
Howard Jenkins, Jr., Member

.....
Sam Zagoria, Member

.....
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Appendix

Decision and Order

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 2-CA-11052

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Employer,

—and—

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO,

Petitioner.

Upon a charge filed by Insurance Workers International Union, AFL-CIO, herein called the Union, the General Counsel for the National Labor Relations Board, by the Regional Director for Region 2, issued a complaint dated July 29, 1966, against State Farm Mutual Automobile Insurance Company, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served upon the Respondent and the Union.

The record before us establishes that on September 27, 1965, the Union filed a petition for an election among cer-

tain of Respondent's employees. Respondent moved to dismiss the petition on the ground that the unit petitioned for was inappropriate. As a result, pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended; the Regional Director for Region 2 directed a hearing to take evidence on that issue. On November 19, 1965, the Hearing Officer issued his Report, and the record was transferred to the Board for disposition. On May 16, 1966, the National Labor Relations Board issued its Decision and Direction of Elections[1] in which it directed elections in two units.

Thereafter, elections were conducted among the employees in both units with the Union winning one election and losing the other. On June 22, 1966, the Union was certified by the Regional Director as the exclusive bargaining representative of Respondent's employees in the unit found appropriate by the Board.[2] On July 29, 1966, the Regional Director issued a complaint and notice of hearing in the above-entitled proceeding, alleging that Respondent had engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. On August 18, 1966, Respondent filed its answer, admitting in part, and denying in part, the allegations of the complaint. It contended that the unit described in paragraph 5 of the complaint did not constitute a unit appropriate for bargaining within the meaning of Section 9 of the Act, and requested that the complaint be dismissed.

On August 30, 1966, pursuant to Section 102.24 of the Board's Rules and Regulations, the General Counsel filed with the Acting Regional Director for Region 2 a Motion

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[1] 158 NLRB No. 84.

[2] Referred to as Voting Unit 1 on the Tally of Ballots and Certification of Representation.

for Summary Judgment and Judgment on the Pleadings, and, on the same date, the Acting Regional Director issued an Order referring the Motion to the Board. On September 1, 1966, the proceeding was transferred to the Board, and the Board directed Respondent to show cause why the General Counsel's Motion for Summary Judgment and Judgment on the Pleadings should not be granted. On September 21, 1966, Respondent filed a Statement in Opposition to the Motion of Counsel for the General Counsel for Summary Judgment and Judgment on the Pleadings and also a Cross Motion to Transfer Case to a Trial Examiner for Hearing. In its Statement, Respondent denied the allegations of the complaint pertaining to the Union's status as exclusive representative of the employees in the unit.

Pursuant to the provisions of Section 3(b) of the Act, the Board has degelated its powers in connection with this case to a three-member panel.

The General Counsel's Motion for Summary Judgment and Respondent's Cross Motion to Transfer Case to Trial Examiner for Hearing

Respondent is engaged in the sale of automobile insurance with its home offices in Bloomington, Illinois. Respondent has 21 administrative divisions; its Northeastern Region includes New York, New Jersey, and the New England States. The smallest physical unit of Respondent's business is the field claims office. The Union's petition for a representation election sought an election among the employees assigned to six field claims offices in the New York City area. Respondent's position in the representation proceeding was that the appropriate unit should be the Northeastern Region, or, at the least, all of the field claims offices in the State of New York. The

Board noted in its Decision that the units sought by Respondent were appropriate units for various reasons, but rejected Respondent's argument that the New York State unit was the smallest appropriate unit. The Board further noted that in previous insurance cases the field claims office has been found to be an appropriate unit, but held that the record in this case demonstrated that the single office unit would not be an appropriate unit. The Board found instead that the smallest appropriate unit was "the divisional unit of employees supervised by a Divisional Superintendent". The Board therefore found that the six offices sought as a unit by the Union, comprising two of the three "divisional units" in New York State, did not constitute an appropriate unit, as there was no justification for joining only two of the divisions into a single unit. Accordingly, in light of the Union's interest in representing New York City area employees, the Board found that each of the two divisions comprising the six offices sought as a unit was an appropriate unit, and, subject to the Union's demonstration of a showing of interest in these two units or in a Statewide unit, the Board directed an election either in the two separate divisions or in a Statewide unit. Subsequently, the Union won a representation election in the unit here involved.

Respondent now argues that it could not have foreseen that the Board's unit determination would rest on the functions of the divisional claims superintendents principally because neither party advanced such a position at the hearing. Had it foreseen such a possibility, Respondent argues, it could have shown, and can now show, that between 1958 and 1966 it added on an average of five divisional claims superintendents each year, and that it is now planning to add another such superintendent in the

New York City area. The General Counsel takes the position that the Board's unit findings need not be relitigated now.

In the absence of newly discovered or previously unavailable evidence, issues which were or could have been raised in the related representation proceeding may not be relitigated in an unfair labor practice proceeding.[3] Respondent does not appear to contend that the situation here falls within the commonly recognized exception to the rule which bars relitigation in this refusal to bargain case of the underlying unit determination in the representation proceeding. Thus Respondent does not argue that the evidence it seeks to introduce now was unavailable then; rather it argues that because neither it nor the Union was seeking the unit that the Board found appropriate, there was no occasion to introduce evidence relevant to that unit. We need not dwell on our reasons for rejecting Respondent's approach, for a glance at Section 9 of the Act makes it clear that, in determining appropriate bargaining units, the Board is not limited to selecting among those urged by the parties. The evidence Respondent would now like to introduce at a hearing was clearly relevant to the issues of unit raised by the Union's petition and litigated at the representation proceeding. We note, moreover, that the facts Respondent seeks to introduce now would establish nothing that was not considered by us in the representa-

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[3] *United States Rubber Company*, 155 NLRB 1298. Where the issue is raised by the General Counsel's Motion for Summary Judgment, the Board is empowered to make this ruling. *Collins & Aikman Corporation*, 160 NLRB No. 135. See *Pittsburgh Plate Glass Company* v. *N. L. R. B.*, 313 U. S. 146, 158.

tion proceeding.[4] As to Respondent's professed intention to make administrative changes affecting the certified unit, such intentions would have to ripen into definite realities before reconsideration of the Board's present unit finding would be warranted.

Accordingly, we hereby deny Respondent's Motion to Transfer Case to Trial Examiner for Hearing.

Thus, as all material issues have been decided by the Board in accordance with the allegations in the complaint or have been admitted in the answer to the complaint, the General Counsel's Motion for Summary Judgment is granted. On the basis of the record before it, the Board makes the following:

Findings of Fact

I. *The Business of Respondent*

Respondent, an Illinois corporation, is engaged in the sale and issuance of various types of insurance policies, including automobile, life, and fire insurance. During the past year, a representative period, Respondent derived gross revenues from its insurance operations in excess of

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[4] We noted, *inter alia*, in our Decision:

> The number of these superintendents in each division is subject to change according to the volume of business and geographic distribution of field claims offices in the division; . . . 158 NLRB No. 84.

We find that the foregoing statement and the related facts recited in our Decision disclose awareness of precisely the point that Respondent asserts that it desires to establish by the introduction of further evidence. In any event, the Respondent did not at any time prior to the election seek reconsideration of the Board's unit determination on the ground now urged.

$500,000. During the same period, Respondent purchased goods, supplies, and services directly from outside the States in which it is located of a gross value in excess of $50,000.

Respondent admits that it is, and has been at all times material herein, an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. *The Labor Organization Involved*

Insurance Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. *The Unfair Labor Practices*

A. *The Appropriate Unit*

The following employees of Respondent constitute and at all times herein material have constituted a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All field claim specialists and field claim representatives employed by Respondent assigned to the Bronxville, Jackson Heights, Queens and Brooklyn offices, excluding superintendent and all other managerial and supervisory personnel, clerical employees, and guards as defined in the Act.

B. *The Certification*

On or about June 7, 1966, a majority of the employees of Respondent voting in a secret election conducted among the employees in said unit, under the supervision of the Regional Director for Region 2, designated the Union as their representative for the purpose of collective bargain-

ing with Respondent. On June 22, 1966, the Regional Director certified the Union as the exclusive collective-bargaining representative of the employees in said unit, and the Union continues to be such representative.

C. *The Request to Bargain and the Respondent's Refusal*

Commencing on or about June 29, 1966, and continuing to date, the Union has requested, and is requesting, Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about July 11, 1966, and continuing to date, Respondent did refuse and continues to refuse to bargain collectively with the Union as the exclusive collective-bargaining representative of all employees in said unit.

Accordingly, we find that the Union was duly certified by the Board as the collective-bargaining representative of the employees of the Respondent in the appropriate unit described above and in the Board's certification, and that the Union at all times since June 22, 1966, has been and now is the exclusive bargaining representative of all the employees in the aforesaid unit, within the meaning of Section 9(a) of the Act. We further find that Respondent has, since July 11, 1966, refused to bargain collectively with the Union as the exclusive bargaining representative of its employees in the appropriate unit, and that, by such refusal, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act.

Appendix

IV. *The Effect of the Unfair Labor Practices Upon Commerce*

The acts of the Respondent set forth in Section III, above, occurring in connection with its operations as described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. *The Remedy*

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

VI. *Conclusions of Law*

1. State Farm Mutual Automobile Insurance Company is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Insurance Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All field claim specialists and field claim representatives employed by Respondent assigned to the Bronxville, Jackson Heights, Queens, and Brooklyn offices excluding superintendents and all other managerial and supervisory personnel, clerical employees, and guards as defined in the Act, constitute a unit appropriate for the purposes of

collective bargaining within the meaning of Section 9(b) of the Act.

4. On June 22, 1966, and at all times thereafter, the above-named labor organization was and has been the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about July 11, 1966, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercising employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a) (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, State Farm Mutual Automobile Insurance Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment, with Insurance Workers International Union, AFL-CIO, as the exclusive and duly certified bargaining representative of its employees in the following appropriate unit:

> All field claim specialists and field claim representatives employed by Respondent assigned to the Bronxville, Jackson Heights, Queens, and Brooklyn offices, excluding superintendents and all other managerial and supervisory personnel, clerical employees, and guards as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization, as the exclusive representative of all employees in the aforesaid appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at the four offices comprising the appropriate unit copies of the attached notice marked "Appendix".[5]

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[5] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order", the words "a Decree of the United States Court of Appeals, Enforcing an Order".

Copies of said notice, to be furnished by the Regional Director for Region 2, shall after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director for Region 2, in writing, within 10 days from the date of this Decision and Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D. C., Mar. 29, 1967

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FRANK W. MCCULLOCH, Chairman

.....

HOWARD JENKINS, JR., Member

.....

SAM ZAGORIA, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Appendix

Decision and Direction of Election

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 29
Case No. 29-RC-751

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Employer,[1]

and

AMERICAN COMMUNICATIONS ASSOCIATION, COMMUNICATIONS TRADE DIVISION, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner.[2]

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before David Lew, a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[3]

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[1] The name of the Employer appears as amended at the hearing.

[2] The name of the Petitioner appears as corrected at the hearing.

[3] The hearing officer denied the motion of the Insurance Workers International Union, AFL-CIO, to intervene inasmuch as it did not present any showing of interest.

Appendix E

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The Petitioner seeks a unit of all field claims specialists and field claim representatives employed in the Employer's Smithtown, Syosset and Jericho offices, located in Nassau and Suffolk counties, New York. It contends that this unit is substantially the same as a unit previously found appropriate by the Board.[4] The Employer asserts that the requested unit is inappropriate because it is too limited in scope, and because it is too fluid to provide a basis for stable collective bargaining. In effect, the Employer is asking for reconsideration of the Board's earlier decision, both because the Board therein did not consider the purpose of the Act relating to the stability of collective bargaining and in the light of additional evidence it presented at the instant hearing.

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[4] *State Farm Mutual Automobile Insurance Company*, 158 NLRB No. 84.

Appendix

As stated in the prior Board decision,[5] the Employer transacts its insurance business throughout the United States and Canada through the medium of 21 regional offices, including a Northeastern Region which encompasses New York, New Jersey, and New England. Operations of the Northeastern Region as directed by a Regional Vice-President from headquarters located in Wayne, New Jersey. Reporting to him are 4 Division Managers, in charge of the operating divisions, and Agency Directors in charge of sales. Within the operating divisions, the Division Managers supervise Divisional Superintendents, who in turn are in charge of groups of offices. Claims superintendents, who are ranked under the Divisional Superintenedents, supervise groups of employees within the offices.

The Board stated in its previous decision involving this Employer that the unit of employees supervised by a Divisional Superintendent was the smallest relatively autonomous component of the Employer's business structure. It noted that the Divisional Superintendents "appear to exercise powers most closely analogous to those possessed by district office managers" in other insurance companies. The Board directed separate elections in metropolitan New York and Nassau-Suffolk county units, based upon the structure of the Divisional Superintendent.

Since the time of the hearing in the prior case in November 1965, the number of Divisional Superintendents nationwide has increased from 81 on January 1, 1965, to 99 as of May 29, 1967. Since the issuance of the Board's

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[5] The record in the prior case and the Board's Decision and Direction of Election therein were stipulated into evidence in this proceeding.

decision in May, 1966, the Employer has opened a third office in Syosset which is included in the Nassau-Suffolk group under the Divisional Superintendent. By September 1 of this year, the Employer intends to appoint an additional Divisional Superintendent in the New York area who will be in charge of personnel concerned with litigation and subrogation.[6] On that same date, it will transfer to the new division a claims superintendent and 2 claims representatives from the Syosset office, 1 claims superintendent and 3 claims representatives from the Jackson Heights (Metropolitan division) office, an undisclosed number of attorneys physically housed at the Jackson Heights location, and a claims superintendent located in the Wayne headquarters.

With the addition of the facts set forth above concerning the changes since the previous hearing, the organizational structure of the Employer and the duties of the Divisional Superintendents appear to remain the same as they were at the time of the Board's determination.

As stated above, the Employer contends that the requested unit is too limited in scope to be appropriate, particularly because of the continuous creation of new divisional superintendents and the shifting of employees. The Board was not unaware of these factors, stating at page 3 of the Decision:

> "The number of these superintendents in each division is subject to change according to the volume of business and geographic distribution of field claims offices in the division; * * *"

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[6] The Employer asserts that the determination to create new divisions and transfer employees is made by the Division Manager and his superiors without any consultation with the Divisional Superintendents.

It also considered the number of transfers of employees. Accordingly, I do not believe that the nation-wide increase in the number of Divisional Superintendents, including proposed creation of a new divisional superintendent in the New York area and the transfer of some employees (only 2 of whom are in the requested unit), warrants any departure from the Board's finding concerning the appropriateness of the requested unit. Nor do I perceive any reason for holding that the requested unit is not sufficiently stable to provide a basis for effective collective bargaining. The Board was well aware of the Employer's administrative structure at the time it issued its decision and no facts have been presented herein to persuade me that there has been any basic change in organization and lines of authority since its decision was issued.

The following employees of the Employer constitute a unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All field claim specialists and field claim representatives employed by the Employer assigned to the Smithtown, Syosset and Jericho, Long Island, New York offices, excluding superintendents and all other managerial and supervisory personnel, clerical employees and guards as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including

employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[7] Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by American Communications Association, Communications Trade Division, affiliated with International

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[7] An election eligibility list, containing the names and addresses of all eligible voters, must be filed by the employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 16 Court Street, Brooklyn, New York, on or before August 11, 1967. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear, Inc.*, 156 NLRB No. 111.

Appendix

Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Dated August 4, 1967
at Brooklyn, New York

Samuel M. Kaynard
Regional Director
16 Court Street
Brooklyn, New York 11201

Appendix

Decision and Order

169 NLRB No. 122

D-646
Long Island, N. Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 29-CA-1110

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

and

AMERICAN COMMUNICATIONS ASSOCIATION, COMMUNICATIONS TRADE DIVISION, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Upon a charge filed by the American Communications Association, Communications Trade Division, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 29, issued a complaint dated September 29, 1967, against State Farm Mutual Automobile Insurance Company, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Sec-

tion 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served upon the Respondent and the Union.

With respect to the unfair labor practices, the complaint alleges, in substance, that on September 15, 1967, the Union was duly certified by the Regional Director for Region 29 as the exclusive bargaining representative of the Respondent's employees in the appropriate unit and that, on or about September 26, 1967, and thereafter, the Respondent refused to recognize or bargain with the Union as such exclusive bargaining representative, although the Union requested the Respondent to do so.

On October 25, 1967, the Respondent filed an answer, denying the commission of the unfair labor practice alleged.

On November 24, 1967, the General Counsel filed with the Board a Motion for Summary Judgment, asserting that there were no issues of fact or law which had not already been litigated before and determined by the Board. Thereafter, on November 28, 1967, the Board issued an Order Transferring Proceeding to the Board and Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Pursuant thereto, Respondent filed a Statement in Opposition to the Motion, and a Cross Motion.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board makes the following:

Appendix

Ruling on the Motion for Summary Judgment

The record before us establishes that in Case No. 2-RC-14145 the Board in its Decision and Direction of Election[1] found a unit composed of all the Respondent's six claims offices in lower New York State to be inappropriate, defining an appropriate unit as those employees under the supervision of a divisional superintendent. The Board stated that the unit of employees supervised by a divisional superintendent was the smallest relatively autonomous component of the Respondent's business structure. Thereafter, the Union filed a petition in Case No. 29-RC-751, seeking to represent an appropriate unit of all field claim specialists and field claim representatives assigned to Respondent's Smithtown, Syosset, and Jericho, Long Island, New York, offices, being all the offices under a divisional superintendent. After a hearing, the Regional Director, relying on the Board's rationale in the aforementioned case, issued a Decision and Direction of Election on August 4, 1967, in which he found appropriate for bargaining a unit of all field claim specialists and field claim representatives employed by the Respondent assigned to the Smithtown, Syosset, and Jericho, Long Island, New York, offices, excluding superintendents and all other managerial and supervisory personnel, clerical employees, and guards as defined in the Act.

On August 17, 1967, the Respondent filed with the Board a Request for Review of the Regional Director's Decision and Direction of Election. The request was denied by the Board on September 1, 1967.

On September 7, 1967, an election was held in which a majority of the employees of the Respondent in the ap-

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[1] *State Farm Mutual Automobile Insurance Co.*, 158 NLRB 925.

propriate unit selected the Union as their representative for the purposes of collective barganing. The Union was certified on September 15, 1967. On or about September 19, 1967, the Union requested that the Respondent bargain collectively with it. This request was refused and, on September 29, 1967, the Regional Director for Region 29 issued the complaint upon which these proceedings are predicated.

In its Statement in Opposition to the Motion, the Respondent argues in substance, that: (1) the unit designated as appropriate by the Regional Director is unstable and fluctuating because the number of divisional superintendents has increased and employees are transferred from one division to another and "the Divisional Claim Superintendent does not have sufficient authority upon which to base a unit determination"; (2) industrial chaos will occur by virute of having different unions in the same metropolitan area representing different groups of interchangeable employees doing the same job; (3) the facts and circumstances of this case are such that the Board's rule that issues determined in a prior representation case may not be relitigated should be relaxed to give the Board the opportunity to properly consider all the circumstances surrounding this matter; and (4) in any event Summary Judgment is improper since such procedure is not sanctioned by the National Labor Relations Act, as amended, nor by the Administrative Procedure Act. The Respondent in its Cross motion urges the Board to transfer the case to a Trial Examiner for a full hearing.

It is well settled that in the absence of newly discovered or previously unavailable evidence, a respondent in a Section 8(a)(5) proceeding is not entitled to litigate issues which were or could have been raised in the prior repre-

sentation proceeding.[2] The circumstances of this case do not warrant a departure from this rule. It is also well settled that the National Labor Relations Board may properly employ the Summary Judgment procedure.[3] All other contentions now made were raised in the Request for Review and were considerd and rejected by the Board.

As all material allegations of the complaint have either previously been found by the Board to be supported or have been admitted in this proceeding by the Respondent and there are no matters requiring a hearing before a Trial Examiner, the General Counsel's Motion for Summary Judgment is granted and the Respondent's Cross Motion denied. On the basis of the record before it, the Board makes the following:

Findings of Fact

I. *The Business of Respondent*

State Farm Mutual Automobile Insurance Company is engaged in the sale of automobile insurance. The Respondent in the course and conduct of its business operations for the preceding 12 months received income, consisting of insurance premiums in excess of $50,000, which were collected within New York State and remitted to points outside the State. The Respondent admits, and we find, that it is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

II. *The Labor Organization Involved*

American Communications Association, Communications Trade Division, affiliated with International Brotherhood

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[2] *Pittsburgh Plate Glass Company* v. *N.L.R.B.*, 313 U. S. 146.

[3] *Union Brothers, Inc.*, 162 NLRB No. 140.

of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. *The Unfair Labor Practices*

A. *The Representation Proceeding*

1. *The Unit*

The following employees of the Respondent constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All field claim specialists and field claim representatives employed by the Respondent assigned to the Smithtown, Syosset, and Jericho, Long Island, New York, offices, excluding superintendents and other managerial and supervisory personnel, clerical employees, and guards as defined in the Act.

2. *The Certification*

On September 7, 1967, a majority of the employees of the Respondent, voting in a secret ballot election conducted among the employees in said unit, under the supervision of the Regional Director for Region 29, designated the Union as their representative for the purposes of collective bargaining with the Respondent. On September 15, 1967, the Union was certified as the exclusive collective-bargaining representative of the employees in the said unit and the Union continues to be such representative.

B. *The Request to Bargain and the Respondent's Refusal*

Commencing on September 19, 1967, and continuing to date, the Union has requested and is requesting the Re-

spondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. On or about September 26, 1967, and continuing to date, the Respondent did refuse, and continues to refuse, to bargain collectively with the Union as exclusive collective-bargaining representative of all employees in said unit.

Accordingly, we find that the Respondent has, since on or about September 26, 1967, refused to bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit, and that, by such refusal, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. *The Effect of the Unfair Labor Practice upon Commerce*

The acts of the Respondent set forth in Sections I and II, above, occurring in connection with its operations as described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and if an understanding is reached, embody such understanding in a signed agreement.

Appendix

CONCLUSIONS OF LAW

1. State Farm Mutual Automobile Insurance Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. American Communications Association, Communications Trade Division, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All field claim specialists and field claim representatives employed by the Respondent assigned to the Smithtown, Syosset, and Jericho, Long Island, New York, offices, excluding superintendents and other managerial and supervisory personnel, clerical employees, and guards as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 (b) of the Act.

4. Since September 7, 1967, the above-named labor organization has been the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 26, 1967, and at all times thereafter to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees in the appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, State Farm Mutual Automobile Insurance Company, Long Island, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment, with American Communications Association, Communications Trade Division, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All field claim specialists and field claim representatives employed by the Respondent assigned to the Smithtown, Syosset, and Jericho, Long Island, New York, offices, excluding superintendents, and other managerial and supervisory personnel, clerical employees, and guards as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit, with respect to wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Smithtown, Syosset, and Jericho, Long Island, New York, offices copies of the attached Notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing within 10 days from the date of this Decision and

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[4] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decision of the United States Court of Appeals, Enforcing an Order."

Order, what steps the Respondent has taken to comply herewith,

Dated, Washington, D. C.,
February 15, 1968

Frank W. McCullough, Chairman

John H. Fanning, Member

Gerald A. Brown, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

Appendix

Statutory Provisions

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

* * *

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

Sec. 10 (e) The Board shall have power to petition any court of appeals of the United States, * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * *. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in

any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * * Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, * * * * [T]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 276

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, PETITIONER

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NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, sitting *en banc* (Pet. App. 20a-29a), is not yet officially reported. The Board's decision and order (Pet. App. 51a-62a) are reported at 163 NLRB No. 94, and its decision in the related representation proceeding (Pet. App. 39a-50a) is reported at 158 NLRB 925.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1969 (Pet. 2). The petition for a writ of certiorari was filed on June 23, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board abused its discretion to determine appropriate collective bargaining units by establishing a unit consisting of the employer's field claim representatives in the metropolitan New York area, rather than a statewide or multi-state unit as requested by the employer.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at pp. 81a-82a of the Appendix to the petition. Also relevant is Section 8(a)(5), which provides:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

The home office of petitioner, a large, national insurance company, where basic business, operating,

and personnel policies are made, is located in Bloomington, Illinois.[1] The next highest level of administrative authority is exercised by the Company's 21 regional headquarters located throughout the United States and Canada. The Northeastern Region, headed by a regional vice president and two deputy vice presidents, with offices at Wayne, New Jersey, has jurisdiction over New York, New Jersey, and the New England States (Pet. App. 41a).

The business of the Northeastern Region is conducted by five divisions, including two automobile operating divisions, each headed by a division manager. Similar in structure and function, one automobile division services claims in New York State and the other services claims in New Jersey and New England. Each division has a service section located at Wayne, which performs clerical functions pertaining to the issuance of policies and the collection of premiums. Each division also has an underwriting section located at Wayne, which underwrites new risks and reunderwrites existing business. Finally, each division has a separate claims section which is responsible for the processing, investigation, negotiation, and payment of claims. The two claims sections employ approximately 170 field claim representatives, who are located throughout the Northeastern

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[1] Thus, policies and practices regarding sick leave, group medical, life and other insurance programs, vacations, travel allowances, promotion procedures, and similar conditions of employment are determined by officers located at the Bloomington office (Pet. App. 44a).

Region.[2] Each division manager supervises the claims, service, and underwriting functions of his division, subject to the overall control of the regional vice president, who in turn is responsible to the Company president (Pet. App. 41a-42a).

Immediately below the division manager are the divisional superintendents.[3] In the New York State division, one of the divisional superintendents supervises the claim superintendents (*infra*, p. 5) and claim representatives who are attached to the Nassau and Smithtown offices (the Nassau-Suffolk group); the second supervises those employees who work out of the Queens, Jackson Heights, Brooklyn, and Bronx offices (the Metropolitan group); and the third supervises the offices in the remainder of New York State (the Upstate group). All divisional superintendents are based at Wayne, New Jersey, and visit the offices under their supervision about once every two weeks. The divisional superintendent for the Nassau-Suffolk group oversees 6 supervisors and 29 claim representatives; the divisional superintendent for the Metropolitan group, 8 supervisors and 32 claim representatives; and the Upstate divisional superintendent, 8 supervisors and 42 claim representatives. Each divi-

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[2] These employees investigate, evaluate, negotiate, and settle casualty claims (Pet. App. 42a).

[3] The claims section of the automobile operating division covering New York State has three divisional superintendents, and there are two in the claims section of the New Jersey-New England division. The number of superintendents in each division is subject to change according to the volume of business and the geographic distribution of field claims offices in the division (Pet. App. 42a).

sional superintendent supervises the instruction of new claim personnel with respect to work flow and claim procedures, reviews the performance of employees under his jurisdiction, and makes recommendations respecting their promotion, hiring, and discipline. Moreover, he reviews claim files and can settle claims for amounts beyond the authority of claim superintendents or claim representatives (Pet. App. 42a-43a).

Below the divisional superintendents are 22 claim superintendents, 13 of whom are located at the Wayne office. Each claim superintendent trains and supervises a specified unit of claim representatives in the handling of claim files. Such units range in size from two to seven, and average about five. The 13 non-resident claim superintendents make weekly visits of about two days' duration to offices where their subordinate claim representatives are based. The remaining nine superintendents are located in the claim offices. As a result of this deployment, there are no supervisors stationed in 10 of the field offices in the New York Division, and in two of the other field offices the resident claim superintendents have supervisory jurisdiction only over some of the claim representatives in their respective offices, the other employees being supervised by non-resident superintendents (Pet. App. 43a-44a).

In September 1965, the Insurance Workers International Union, AFL-CIO, filed a representation petition with the Board, pursuant to Section 9(c) of the Act, in which it sought certification as bargaining representative of a unit consisting of the claim

representatives in the Company's six offices in the Metropolitan and Nassau-Suffolk groups.[4] At the representation hearing, the Company moved to dismiss the petition on the ground that the unit sought by the Union was inappropriate and that the appropriate unit should consist of either the claim representatives in the entire Northeastern Region, or, at a minimum, all of those located in New York State.

The Board noted that, in *Quaker City Life Insurance Co.*, 134 NLRB 960, it had concluded that, in view of the autonomous character of the single district office there involved and the overall immediate supervision exercised by the district manager, a unit consisting of the employees in the district office was an appropriate bargaining unit. It found, however, that the present case presented "a significantly different picture of field operating procedure," since "the smallest component of the Employer's business structure which may be said to be relatively autonomous in its operation is not the field claims office, but rather the divisional unit of employees supervised by a Divisional Superintendent. By virtue of the managerial authority reposed in the three Divisional Superintendents, who represent a supervisory focal point for their respective groups of 39, 32, and 29 claim representatives, these functionaries appear to exercise powers most closely analogous to those possessed by the district managers in the earlier cases"

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[4] These offices employ 61 of the 103 claim representatives in the New York automobile operating division and are under the supervision of two of the three divisional superintendents (Pet. App. 45a).

(Pet. App. 46a). Accordingly, the Board concluded that, while a unit comprising all three divisions, as contended for by the Company, would be appropriate for bargaining, each division would also constitute an appropriate unit. The Board further concluded that the unit sought by the Union—a single unit combining only two of the divisions—could be justified on neither geographic nor administrative grounds (Pet. App. 46a-48a). Since separate divisional units were the closest to the unit petitioned for by the Union, the Board directed elections in the following divisional units—"one comprising the four Metropolitan offices, and the other, the two Nassau-Suffolk offices" (Pet. App. 48a).[5]

The Union won the election in the Metropolitan group and lost in the Nassau-Suffolk group. Thereafter, the Company refused to bargain with the Union respecting the Metropolitan group, contending that the unit was inappropriate. The Union filed unfair labor practice charges, and, in the resultant unfair labor practice proceeding, the Board found that the Company had violated Sections 8(a)(5), and (1) of the Act. The Board ordered the Company, *inter alia*, to bargain with the Union upon request (Pet. App. 51a-62a).

A panel of the court of appeals (with one judge dissenting) denied enforcement of the Board's order (Pet. App. 1a-19a). Upon rehearing, the full Court

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[5] The Board conditioned the elections upon the Union's making a sufficient showing of interest in each unit (Pet. App. 48a).

(with two judges dissenting) reversed the panel decision, and enforced the Board's order (Pet. App. 20a-29a).

ARGUMENT

1. Section 9(b) of the Act empowers the Board to decide whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Petitioner does not deny that, under this broad grant of authority, the Board may properly find that autonomous divisions within an insurance company, such as the individual district office, constitute appropriate units for collective bargaining purposes. See *Quaker City Life Insurance Co.*, 134 NLRB 960, enforced, 319 F. 2d 690 (C.A. 4). Petitioner's basic contention is that the Board erred in concluding that the unit of employees supervised by a divisional superintendent was sufficiently autonomous to constitute an appropriate bargaining unit (Pet. 12). This issue, turning as it does on the facts of this particular case, which are unlike those in the typical insurance company case (see *supra*, p. 6), does not warrant review by this Court. Compare *National Labor Relations Board* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438.

Nor is a different conclusion required by petitioner's contention (Pet. 12) that the Board "failed to give any weight to petitioner's administrative structure and to the supervisory level in petitioner's organization at which labor relations decisions are made." The Board considered these factors (see Pet.

App. 44a), but concluded that nonetheless the autonomy of the divisional superintendent and his control over the day-to-day work performance of the field claim representatives were sufficient to make the unit supervised by him an appropriate one for collective bargaining purposes. As the court below stated (Pet. App. 24a):

> * * * [T]he leader of the unit chosen is the Company official who directly controls and supervises the day to day work of the employees; under the Company's organization the next larger unit would, on the average, cover a multi-state area; the smallest unit under the Company's organization which has a leader, the regional vice-president, with any formal control over employee policy would cover all of New York, New Jersey, and New England; and the smallest unit where there is substantial control over employee policy, the Bloomington Home Office, is nation-wide. Under these circumstances, the reasonableness of the Board's determination is clear.

Contrary to petitioner's assertion, there is no conflict of decisions. The cases cited by petitioner (Pet. 12-14) are factually distinguishable, as the court below pointed out (Pet. App. 26a). No abuse of the broad discretion conferred on the Board in making unit determinations is involved; its decision in this regard is amply supported by substantial evidence relating to the Company's organizational structure (see Pet. App. 28a). See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474.

2. Finally, there is no substance to petitioner's contention (Pet. 16) that the arbitrariness of the

Board's unit determination is shown by the fact that it may result in a situation where employees in the same office, doing the same work, are represented by different and competing unions.[6] Such a situation, should it materialize, is not essentially different from that which exists in an industrial plant whenever a less than plant-wide unit is established. If a smaller unit rests on rational grounds, and operates "to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act" (Section 9(b)), as does the unit here, it is not rendered inappropriate merely because it would be more convenient for the employer to have a larger bargaining unit.

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[6] Subsequent to the Board decision herein, the Company announced its intention to appoint an additional divisional superintendent and to transfer to his jurisdiction, *inter alia*, one claim supervisor and three claim representatives from the Jackson Heights (Metropolitan group) office (Pet. App. 66a).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
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JULY 1969.

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